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DETERMINED BY THE

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OF THE

HIGH COURT OF JUSTICE

AND BY THE

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ON APPEAL THEREFROM

AND BY THE

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AND BY THE

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[IN THE COURT OF APPEAL.]

C. A.
1921
June 10, 13.

GLOSSOP AND ANOTHER *v.* ASHLEY.

[1920. G. 2391.]

Emergency Legislation—Landlord and Tenant—Sub-tenant becoming Tenant—Standard Rent—Right of Landlord to increase Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 3, 12, 15, *sub-s.* 3.

On August 3, 1914, a brewery company were lessees of a public-house at a rent of 130*l.* under a lease containing no covenant for the purchase of liquors, and the company had sub-let the house to the defendant on a quarterly tenancy at a rent of 24*l.* a year by an agreement containing a clause for the purchase of liquors by the defendant from the company. In August, 1916, the lease to the brewery company expired and was not renewed and the defendant then became tenant to the owners of the house, who were the plaintiffs, at a rent subsequently fixed

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at 30*l.* a year. On March 23, 1920, the plaintiffs duly gave the defendant notice to quit on June 24, 1920. They also gave him notice that if he held over after that date his rent would be 130*l.* a year. The defendant held over but refused to pay rent at a higher rate than 30*l.* a year. The rateable value of the house was 24*l.* 16*s.* and no more.

In an action by the plaintiffs for possession of the house :—

Held, that the defendant having been in occupation of the house on and ever since August 3, 1914, the standard rent was 24*l.*, or at the most 24*l.* 16*s.*, and not 130*l.*

Where the tenant is paying less than the standard rent *quaere* whether the landlord by a notice without the tenant's assent can increase the rent to the limit of the standard rent.

Quaere whether in every case the standard rent of a dwelling house is the rent paid by the tenant actually in occupation on August 3, 1914.

Judgment of McCardie J. [1921] 2 K. B. 451 affirmed.

APPEAL from the judgment of McCardie J. (1) in an action tried before the learned judge without a jury.

In August, 1911, the owners of a public-house known as the "King's Arms" at Crich in the county of Derby let the house to the Chesterfield Brewery Co., Ld., for a term of five years from August 28, 1911, at a rent of 130*l.* a year. The brewery company continued to pay that rent until the expiration of the lease in August, 1916.

In October, 1911, the brewery company sub-let the premises to the defendant by an agreement in which the defendant undertook to purchase liquors from the brewery company. He also agreed to pay a rent of 40*l.* a year. This was afterwards reduced to 24*l.* a year, and on August 3, 1914, the date for ascertaining the standard rent of the premises, the rent which the defendant was paying to the brewery company was the reduced rent of 24*l.* a year. Subsequently this rent was further reduced to 15*l.* a year.

In August, 1916, when the lease to the brewery company expired the plaintiffs were mortgagees in possession of the premises. They let them to the defendant first at a rent of 15*l.* a year, and afterwards, namely from February, 1918, on a quarterly tenancy at a rent of 30*l.* a year.

On March 23, 1920, the plaintiffs duly gave the defendant notice to quit on June 24, 1920. With that notice they sent a letter to the effect that if the defendant held over after

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June 24 the rent from that date would be at the rate of 130*l.* a year "being the amount payable in respect of the premises in 1914."

The defendant refused to quit the premises and refused to pay the rent of 130*l.* a year. He tendered rent at the rate of 30*l.* a year and insisted that by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, he was entitled to remain in possession.

On November 6, 1920, the plaintiffs brought an action for possession. The rateable value of the premises was 24*l.* 16*s.* McCardie J. gave judgment for the defendant.

The plaintiffs appealed.

Disturnal K.C. and *P. E. Sandlands* for the appellants. The standard rent of a house within the Act of 1920 is the rent at which the house was let on August 3, 1914: s. 12, sub-s. 1 (*a*). At that date this house was let to the brewery company at 130*l.* a year; therefore 130*l.* was the standard rent. When the lease of the brewery company came to an end the respondent became the tenant of the appellants on the same terms as he would have held from the brewery company if that company's lease had continued. He became tenant of the appellants "subject to the provisions of this Act": s. 15, sub-s. 3. One of those provisions is that the tenant is liable to pay the standard rent. If he will not pay the standard rent he may be evicted: s. 5, sub-s. 1 (*a*).

The respondent relies on the words in s. 12, sub-s. 1 (*g*), that the expression "let" includes sub-let; he states, as the fact is, that on August 3, 1914, the house had been sub-let to him at 24*l.* a year and that this was therefore the standard rent. If this question had arisen between the respondent and his former landlords, the brewery company, that argument would have weight. As between those parties 24*l.* would have been the standard rent, the house being sub-let at that rent; but as between the appellants and the brewery company the standard rent was 130*l.* The Act contemplates more than one standard rent; it contemplates as many standard rents as there are tenancies of the

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house. If the question arises between the freeholder and his lessee the standard rent is the rent the lessee was paying on August 3, 1914. The freeholder has no concern with and no knowledge of the rent which his lessee is receiving from a sub-tenant. Similarly if the question arises between the lessee and his sub-tenant the standard rent is the rent the sub-tenant was paying on August 3, 1914, and the lessee has no concern with the rent which his sub-tenant may be receiving from a second sub-tenant; neither has the sub-tenant any concern with the rent which the lessee is paying to the freeholder. Thus there are as many standard rents as there are tenancies, and the standard rent in any particular case depends upon the particular tenancy in question. Otherwise whenever a house was sub-let there would be two standard rents as between each tenant and each landlord; one, that at which it was let; and the other, that at which it was sub-let. The Act cannot have intended that.

In the present case the question arises between the freeholders and one who by the Act is deemed to have become their tenant on the terms of his tenancy to the brewery company, but subject to the obligation to pay the standard rent, that is the rent at which the freeholders let to their tenants; in other words at 130*l.* a year.

Wootten K.C. and *Ralph Thomas* for the respondent. There is nothing in the Rent (Restrictions) Acts from the first to the last to suggest that the Legislature contemplated more than one standard rent; and that standard rent is, as McCardie J. rightly held, the rent which was payable by the tenant in occupation on August 3, 1914.

Disturnal K.C. in reply.

BANKES L.J. This appeal must be dismissed. Three questions were decided by McCardie J.; first the effect of the tenant continuing in possession after the notice of March 23. The learned judge decided that this did not operate as an assent on the part of the tenant to the increased rent. I agree with that view. Mr. Disturnal contended that the only legitimate conclusion from the conduct of the tenant

was that he accepted the offer of a tenancy on fresh terms. McCardie J. gave the true answer to that contention, namely that the tenant never did assent but strongly protested against the proposed increase, and that he was entitled to take up the position of a statutory tenant under the Act.

Secondly the learned judge held that where a landlord seeks to increase the rent by an amount allowed by the Act, and gives notice to the tenant that if he continues in possession he must pay at the increased rate, the tenant who holds over as a statutory tenant must pay the permissible increase; that a tenant who is taking up the position of a statutory tenant must accept the statutory obligations; whether in point of fact he assents to or dissents from the landlord's demand is immaterial; if he remains in occupation he remains upon the terms which the statute enables the landlord to impose. This expression of opinion was not necessary to the decision of the case, but the learned judge decided it and I think he decided it rightly.

The third point decided by the learned judge was that the standard rent in this case was not 130*l.*, but was the rent paid by the respondent to the brewery company on August 3, 1914. At that date the standard rent was 24*l.* 16*s.*, the amount at which the premises were then assessed, which was slightly in excess of the agreed rent. The learned judge said (1): "Upon the whole I come to the conclusion that the rent to be considered in each case must be the rent paid by the occupying tenant on August 3, 1914. Here that rent was 24*l.* only. It is true that such rent was a 'tied house' rent. But it was in fact the 'rent' agreed and payable. It was the only rent which could be sued for or distrained for." The last words of this passage were the subject of some comment, because it is clear that the 130*l.* which the brewery company was paying could also have been distrained for. But the learned judge was not directing his mind to any distinction between the rent paid by the brewery company and the rent paid to that company; he was thinking only of the rent paid to the company and was disposing of the

(1) [1921] 2 K. B. 459.

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contention that the rent so paid must for the purpose of ascertaining the standard rent be considered as something more than that which he describes as a tied house rent.

I agree with the conclusion of the learned judge in this particular case, but I am not prepared to hold that in every case the standard rent is the rent paid by that person whoever he may be who was the tenant in actual occupation on August 3, 1914. Discussion of this statute shows that there are many cases which were never contemplated by the draftsman and any attempt to give an interpretation which will be generally applicable is sure to prove an obstacle in the way of doing justice in some unforeseen case. Mr. Disturnal contended that s. 12 of the Act of 1920 clearly contemplates more than one standard rent existing on August 3, 1914; for example, in the present case the brewery company were paying 130*l.* to the appellants' predecessors and the defendant was paying 24*l.* to the brewery company. Which of these was the standard rent? By s. 12, sub-s. 1 (*a*) and (*g*), the expression "standard rent" means the rent at which the dwelling house was let on August 3, 1914, and the expression "let" includes sub-let. Therefore, it is argued, the statute is speaking not only of the original letting but of every sub-letting of the dwelling house, and so there may be any number of standard rents, and the standard rent in question in any particular case is the rent payable by that tenant to that landlord between whom the dispute has arisen. Mr. Wootten disputes this, and contends that the plain intention of the Act is that there should be but one standard rent, namely the rent payable on August 3, 1914, by the tenant then in occupation to his immediate landlord. In my view there are difficulties in the way of either construction as applicable to every case. For instance, to test Mr. Wootten's position—which is the view taken by the learned judge—suppose, when the brewery company's lease came to an end in 1916, the occupying tenant had gone out of possession and the appellants had sought to find a new tenant; if the standard rent was then, as Mr. Wootten contends, the rent which the occupying tenant had paid, the appellants would have

found it difficult, under the Act then in force, to get more than 24*l.* rent though they had been receiving 130*l.* at the time when their tenant went out. In deciding this case I wish to say as little as possible by way of a general rule; but this much I do say: the statute was passed in the interest of tenants with the object of preventing a general rise in rents of small tenements and of protecting tenants in occupation. Accordingly when occasion arises for ascertaining the standard rent it may be assumed that the Legislature had more regard to the rent paid by the tenant than to the rent claimed by the landlord; and when the question arises between a landlord and a sitting tenant who was in occupation on August 3, 1914, the standard rent is the rent which that tenant was paying at that date, because he is the person whom the Legislature was intending to protect when it fixed the standard rent.

The question whether the Act of 1920 permits any increase other than those specified in the first schedule, in a case where the agreed rent is less than the standard rent, may have to be decided at some future time. On the main point I agree with the judgment of McCardie J. except that I reserve the question whether the rule which he lays down for ascertaining the standard rent is or is not a rule of general application.

SCRUTTON L.J. This is another of those difficult cases which arise under these Acts and show that the Acts were drafted in haste to meet an urgent public necessity without due consideration of the effect or results of their provisions. The predecessors of the appellants let a small house to a brewery company at a rent of 130*l.* a year. The brewery company sub-let the house to the respondent at a rent of 40*l.* with a tie. Subsequently the rent of 40*l.* was reduced to 24*l.*, and this was the rent in force on August 3, 1914. In August, 1916, the brewery company's lease expired and was not renewed, and the respondent became tenant to the appellants. In March, 1920, the appellants gave the respondent notice to quit in the following June, but told him that

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he might remain in occupation at a rent of 130*l.*, the amount they were receiving on August 3, 1914. The respondent replied that he was not paying 130*l.* in August, 1914, but only 24*l.*, and that he would pay no more. Who is right?

The first question is, What is the standard rent of the house? The definition of standard rent is the rent at which the dwelling house was let on August 3, 1914. On that date there were two lettings, and there might have been more. What is the result? The tenant says the rent paid by the occupying tenant is the standard rent. The landlords say there are as many standard rents as there are tenancies, and the standard rent to be applied in any particular case depends upon the tenancy in question in that case. The argument may be put forcibly from either point of view. The landlords say they are not increasing what they were receiving. The tenant says he is asked to increase what he was paying. I have come to the conclusion that only one standard rent is contemplated by the Legislature. The Act of 1919 in s. 4 speaks of a percentage on the standard rent and the Act of 1920 in s. 2, sub-s. 1 (*c*) and (*d*), speaks of a percentage on the net rent, which in many cases means the standard rent. That suggests one standard rent and not as many standard rents as there were lettings of the house on August 3, 1914. Again, let us suppose that there were on August 3, 1914, one letting and four sub-lettings of the same dwelling house, and suppose that these tenancies had determined and that in 1920 there were one tenancy and three sub-tenancies vested in other persons; what is the standard rent to be applied if a question arose in 1920 between the second and the third of these new sub-tenants? I cannot answer that question. This difficulty and the general language of the Acts throughout seem to me to show that the Legislature contemplated only one standard rent. Then is it the rent paid by the tenant or the rent received by the landlord? The object of the legislation was to protect the tenant in occupation and allow him to remain in possession as long as he pays the rent he was paying in August, 1914. That points to the rent paid by the occupying tenant rather than to the rent received by the

landlord. The tenant in this case was paying 24*l.*, which could have been raised to 24*l.* 16*s.* by the proviso to s. 12, sub-s. 1 (*a*), which in certain cases makes the rateable value the standard rent. This interpretation of the Act does not hurt the landlord in a case where the sub-tenants are paying more than he is receiving, because in my view he is entitled to receive rent up to the amount of the standard rent. In those rare cases where the tenant is paying less than the rateable value the landlord can claim a rent equal to the rateable value. Subject to this I think McCardie J. was right in holding that the standard rent was the rent which was paid by this tenant in 1914. If that had been 130*l.* there would have been no difficulty in making him pay that amount, not because he remained in possession after notice to pay 130*l.*, but because he remained in possession as a statutory tenant and the statute imposes on him the obligation to pay the rent lawfully due from him.

ATKIN L.J. I agree; although for the reasons given I think it undesirable to give to this enactment any general construction which may give rise to many unforeseen complications. There are two suggested explanations of the expression "standard rent." One is that there is only one standard rent, namely the rent paid by the person in actual occupation of the house on August 3, 1914. The other is that there may be as many standard rents as there were tenancies of the house at that date. If the first view is right there is no further question; the judgment of McCardie J. is right. My own opinion inclines to that as the right view, but I do not decide it. The object of the original Act was to restrict the rent of small dwelling houses, and the only standard of smallness was the rental or rateable value, which is itself based upon a hypothetical rent. I am therefore inclined to think that there is only one standard of smallness and that it is based on rent; and if it be based on one rent only, that rent is the rent adopted by McCardie J. The other view is that there are various standard rents, and that when

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a dispute arises between any immediate landlord and his immediate tenant the standard rent is the rent paid on August 3, 1914, by that tenant to that landlord. Then a case may arise between a landlord, who had an immediate tenant, and the sub-tenant of that immediate tenant, the sub-tenant having assumed the relation of tenant to the original landlord. What is then the standard rent? Is it the rent which was received by the landlord from his former tenant in August, 1914, or is it the rent which was paid by the now tenant to his former landlord? There can be no doubt at all that the intention of the Legislature was to protect tenants rather than landlords. On this I stated my view in *Epsom Grand Stand Association* v. *Clarke* (1) and I need not repeat what I said there. In my view it is the tenant's right that is protected, and when I consider s. 15, sub-s. 3, and its obvious intention to secure the sub-tenant as far as possible in the position he would have occupied if his relation to his former landlord had continued, I cannot reconcile that sub-section with the argument for the appellants. In the present case therefore whether as a general proposition the view of McCardie J., which I am inclined to agree with, is right, or whether the view of the appellants is right, the standard rent is that contended for by the respondent.

It is unnecessary to decide the question whether a landlord can increase the actual rent up to the standard rent apart from the statutory provisions permitting an increase. It is said that the statute has given the right in certain circumstances to increase the rent by the amount by which the rates are increased even though the rent so increased exceeds the standard rent, and that there necessarily follows a statutory right to increase the rent up to the standard rent, though this is not among the increases expressly allowed. On the other hand the notice which must be given under s. 3, sub-s. 2, of the Act of 1920 makes no mention of the standard rent except where the increase is calculated on the basis of the standard rent. It is difficult to find any statutory right to increase the rent from the actual rent to

(1) [1919] W. N. 170; 35 Times L. R. 525.

the standard rent. This may have an important bearing upon the question whether a mere notice is enough to impose on the tenant an obligation to pay the full standard rent. If the landlord has a statutory right to increase the rent and is acting within that right then a mere notice would be enough; the tenant would have no right to remain unless he paid the rent demanded, and if he did remain his landlord would have a basis on which he could exact the rent. But if he has no such basis then I agree for the reasons given by McCardie J. that a mere notice would not be enough. If the landlord has merely a right at common law to increase the rent he must show that his tenant assents to the increase. The mere fact that the tenant remains in possession after the notice, when he has the option of remaining either as statutory tenant under the Act or as a tenant at an increased rent, is no evidence of an agreement to pay the increased rent. For my part I am not prepared to assent to the proposition that a landlord has the right to increase the rent up to the standard rent.

Appeal dismissed.

Solicitors for appellants: *Stevens, Son & Parkes.*

Solicitors for respondent: *Gibson & Weldon, for Pym & Pym, Belper.*

W. H. G.

C. A.

1921

June 23, 24; *July* 15.

[IN THE COURT OF APPEAL.]

CHELLEW *v.* THE ROYAL COMMISSION ON THE SUGAR SUPPLY.

Shipping—General Average—Expenditure—Subsequent Loss of Ship and Cargo—Liability of Cargo Owner to contribute—York-Antwerp Rules, 1890, *r.* 17.

By r. 17 of the York-Antwerp Rules, 1890, the contribution to a general average act shall be made upon the actual values of the property at the termination of the adventure.

A ship left Cuba with a cargo of sugar under bills of lading whereby the cargo was to be carried to Queenstown for orders and to be delivered to named consignees at the port of destination. The bills of lading provided that general average should be payable according to York-Antwerp rules.

On her way from Cuba to Queenstown the ship sustained damage to her hull and engines, and the master put into a port of refuge in the Azores where he incurred expenses for maintenance and wages of officers and crew and for port charges. By rr. 10 and 11 of the York-Antwerp rules these are to be admitted as general average expenses. Soon after leaving the port of refuge the ship and cargo were totally lost at sea by fire.

The shipowner claimed contribution in general average from the consignees of the cargo:—

Held, that the claim failed, inasmuch as at the termination of the adventure, namely on the loss of the ship and cargo, the cargo had no value.

Quaere whether the claim would have succeeded apart from the York-Antwerp rules.

Judgment of Sankey J. [1921] 2 K. B. 627 affirmed.

Appeal from the judgment of Sankey J. (1) upon a special case stated by an arbitrator.

In the special case part of which is set out below the owner of the steamship *Penlee* is referred to as the claimant and the Royal Commission on the Sugar Supply are referred to as the respondents. The following facts were stated.

"1. In January, 1919, the *Penlee* loaded a cargo of sugar at two ports in Cuba. Various bills of lading for this cargo were issued. By these bills of lading the cargo was to be carried to Queenstown for orders and to be delivered at the port of destination to the respondents. Each bill of lading

(1) [1921] 2 K. B. 627.

contained the provision 'General average payable according to York-Antwerp Rules.' The respondents were at all material times the owners of the cargo and holders of the bills of lading.

"2. The *Penlee* sailed from Cuba with the cargo on January 29, 1919. She encountered a hurricane on February 10 and sustained damage to her hull and engines. In consequence of the damage her master prudently determined to put into Horta in the Azores, as a port of refuge, where she arrived on February 22. At Horta certain repairs were done, and she sailed from Horta upon their completion on March 15.

"3. At Horta certain expenses of the nature of port of refuge expenses, were incurred by the claimant amounting in all to 717*l.* 16*s.* 3*d.* As the damage to the ship which occasioned resort to Horta was of the nature of particular average, and did not arise from any general average sacrifice, the claimant would not have been entitled to assert that he had a right at common law to a contribution in general average towards any of the above expenses in view of the decision in *Svendsen* v. *Wallace*. (1) But under Nos. 10 and 11 of the York-Antwerp Rules, 1890 (2), the claimant was prima

(1) (1885) 10 App. Cas. 404.

(2) York-Antwerp Rules, 1890. Rule X.—"Expenses at port of refuge, etc.

(*a*).—When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(*b*).—The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(*c*).—Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on

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facie entitled to say that all the above expenses amounting to 717*l.* 16*s.* 3*d.* ought to be treated as a general average expenditure. The said expenses were incurred for wages and maintenance of the officers and crew at Horta, and port charges, and did not include any outlay made for discharging or

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board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(*d*).—If a ship under average be at a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by (sic) another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI.—Wages and maintenance of crew in port of refuge, etc. When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X., the wages payable to the master, officers and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XVI.—Amount to be made good for cargo lost or damaged by sacrifice. The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII.—Contributory values. The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average. . . . ."

reloading cargo, or otherwise directly incurred in relation to the cargo or its preservation.

" 4. The *Penlee* sailed from Horta on March 15 for Queenstown. Signs of fire on board were discovered on March 18. This fire apparently broke out in the cargo in No. 2 hold, but there was no evidence before me as to its cause. The fire increased so rapidly and seriously that on March 20 her master and crew were compelled to abandon the vessel and take refuge on another ship. The *Penlee* and her whole cargo thus abandoned were totally lost at sea.

" 5. The claimant subsequently procured an average adjustment to be prepared by Messrs. Manley Hopkins, Son & Cookes, in which the above sum of 717*l.* 16*s.* 3*d.* was treated as general average expenditure. This was apportioned over the steamer valued at 89,250*l.*, the cargo valued at 140,000*l.*, and the shipowner's freight at risk valued at 1184*l.* The value of 89,250*l.* for the steamer was the estimated value she would have had on arrival in the United Kingdom, and the value of 140,000*l.* for the cargo was the estimated value that the cargo would have had if it had arrived at the port of delivery in good condition.

" 6. Upon the above apportionment the cargo's proportion of the 717*l.* 16*s.* 3*d.* was 436*l.* 2*s.* 2*d.* The claimant required the respondents to pay this sum of 436*l.* 2*s.* 2*d.* but the respondents refused, and this was the dispute referred to me.

" 7. It is apparent that upon these facts there arises this question of law: If subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost? It is a question upon which I can find no authority at all directly in point, but one which has been much canvassed by the writers of text books. . . . ." (1)

(1) The learned arbitrator proceeded in this and ten following paragraphs to discuss the opinions of various text writers. Those paragraphs are set out in full in the report of the case in the Court below. The view taken by the Court of Appeal makes it unnecessary to repeat them here.

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"18. My own conclusion is that the rules of the common law are as follows :—

(i.) The right of a shipowner to contribution in general average is the same whether his claim is for contribution to a general average sacrifice or for contribution to general average expenditure.

(ii.) The extent of the right of a shipowner to contribution in general average is the same as the extent of the right to such contribution of any other party to the contract of affreightment.

(iii.) A claim to contribution in general average by any party to the contract of affreightment must be assessed upon the properties of all parties to that contract upon the values of such properties at the port of adjustment, and the port of adjustment, if the voyage has not been abandoned at an earlier port, is the port of the agreed destination under that contract.

(iv.) If the property of any party to the contract of affreightment who is called upon to contribute in general average to another party or parties, has no value at the port of adjustment, either by its arrival in a worthless condition, or by its not arriving at all, that party cannot be made to contribute.

"19. I should arrive at the same result in the present case upon another and narrower ground. The shipowner's right to treat this sum of 717*l.* 16*s.* 3*d.* as general average expenditure arises solely as matter of contract, by the incorporation in the bills of lading of the York-Antwerp Rules, 1890 (see par. 3 above). In construing the contract so made I think Nos. 10 and 11 of the rules must be read in conjunction with No. 17 and that so construed the result is the same as I have suggested in par. 18.

"20. I award that the claimant is not entitled to recover the sum of 436*l.* 2*s.* 2*d.* or any sum from the respondents. I direct that the claimant shall pay the costs of this my award, and if the respondents shall in the first place pay

such costs the claimant shall repay them. And I direct that the claimant shall pay to the respondents their costs of the reference to be taxed if not agreed.

"21. If the Court shall be of opinion that the claimant is entitled to claim contribution in general average from the respondents to the said sum of 717*l.* 16*s.* 3*d.* and is entitled to have such contribution assessed upon the values of ship, freight, and cargo as they would have been at the port of destination if the voyage from Horta had been safely accomplished, then I award that the claimant shall recover from the respondents the sum of 436*l.* 2*s.* 2*d.* I direct, in that case, that the respondents shall pay the costs of this my award, and if the claimant shall have paid such costs they shall repay them to him. And I direct that the respondents shall pay to the claimant his costs of the reference to be taxed if not agreed.

"22. If the Court shall be of opinion that the claimant is entitled to claim contribution in general average from the respondents to the said 717*l.* 16*s.* 3*d.* and is entitled to have such contribution assessed upon the values of ship, freight, and cargo as they existed at Horta, then I award that the claimant is entitled to recover from the respondents such proportion of 717*l.* 16*s.* 3*d.* as the value of the respondents' cargo at Horta bore to the combined values at Horta of the ship, the freight at risk, and the said cargo. And in this case I make the same direction as to costs as in par. 21. . . . ."

Sankey J. agreed with the conclusions stated by the arbitrator in para. 18 of the special case and upheld the award.

The claimant appealed.

Jowitt for the appellant.

Le Quesne for the respondents.

Cur. adv. vult.

July 15. The following written judgments were delivered.

BANKES L.J. This is an appeal from a judgment of Sankey J. upon a special case stated by an arbitrator. The

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case was stated to raise a point of law which is formulated by the arbitrator in para. 7 of the special case in these terms: "If subsequently to the incurring by a shipowner of general average expenditure the ship and all her cargo are totally lost while completing the agreed voyage, can the shipowner claim any contribution in general average from the owners of the cargo so lost?"

The cargo in this case was being carried under bills of lading which contained the clause "General average payable according to York-Antwerp rules." The learned arbitrator in the special case discusses at length all the authorities on the point, upon which no judicial decision has ever been given, in order to discover what the proper answer to the question of law would be were the matter governed by the common law. He then goes on to say in para. 19 of the special case as follows: "The shipowner's right to treat this sum of 717*l.* 16*s.* 3*d.* as general average expenditure arises solely as matter of contract by the incorporation in the bills of lading of the York-Antwerp rules, 1890. In construing the contract so made I think Nos. 10 and 11 of the rules must be read in conjunction with No. 17 and that so construed the result is the same as I have suggested in paragraph 18."

For the reasons given by Scrutton L.J. I agree with the view taken by the arbitrator that the present case falls within r. 17. I express no opinion upon what the common law rule should be. The appeal must be dismissed with costs here and below, the Court expressing its opinion that the award of the arbitrator as stated in para. 20 of the special case is correct.

I may say that Atkin L.J. agrees with the judgment I have just read.

SCRUTTON L.J. This appeal was stated to raise a very controversial question in the law of general average, namely whether there is any difference between the principles of adjustment in cases of general average sacrifice and general average expenditure where after the sacrifice or expenditure the ship and goods are lost by other perils before arrival

at the port of destination. And, if the facts raised this point, they would raise a question of considerable difficulty. There is an absence of case law on the subject, an embarrassing abundance of contradictory opinions of text writers, and a varying practice of average adjusters. But in my view the facts do not raise this question. The parties to the contract of affreightment agreed that their contract should be governed by York-Antwerp rules. These rules, the result of two conferences of leading representatives of underwriters, shipowners, and average adjusters, were intended to avoid by agreement difficult questions on which lawyers and experts disagreed. For instance, the English law on port of refuge expenses, as appears from the cases of *Atwood* v. *Sellar* (1) and *Svendsen* v. *Wallace* (2), was far from clear. The York-Antwerp rules solved the difficulty by making rules not in accordance with the existing decisions under which all the port of refuge expenses in the present case are treated as general average. The first question therefore is to see whether the York-Antwerp rules provide an agreed answer to the present problem. Rule 17 provides that "The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure." When the adventure arrives at its intended port of destination it is agreed therefore that the contributing values are to be those at that port and not at the port where the expenditure was incurred, thus avoiding the question most in dispute as to expenditure, whether the values should not be taken as at the port where the expenditure was incurred. What happens when ship and cargo are lost and never reach the intended end of the adventure? Though the adventure terminates prematurely it seems clear to me that it terminates, and the actual values are then nothing and no contribution can be levied on them. If part of the interests get to the intended end of the adventure, as if cargo be trans-shipped and freight earned, there are contributing values available. But having regard to the conflicting language of text writers and conflicting practice of average adjusters, it appears to

(1) (1880) 5 Q. B. D. 286. (2) 10 App. Cas. 404.

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Scrutton L.J.

me that r. 17 was intended to avoid the decision of the difficulties by agreeing a rule. And in my view that rule decides that in this case there was no contribution to the shipowner's general average expenditure, because at the termination of the adventure there were no contributing values. If this is the true view of the case there is no need to discuss what would be the law if the parties had not agreed on York-Antwerp rules, and I notice that the learned arbitrator is of opinion that the York-Antwerp rules decide the question adversely to the claim, though he was unable to resist the temptation of deciding what would be the law if the rules did not exclude the claim.

I reserve to myself full liberty to consider the question of common law in the absence of agreement when it arises, as in my view there is a great deal to be said in principle for the view of Mr. Phillips and Sir Joseph Arnould supported by the analogies of liabilities for salvage both maritime and by agreement, and by the view of Gorell Barnes J. in *The Mary Thomas* (1) as to the rights of the person making general average expenditure against his underwriters. It may be that practical difficulties giving rise to a practice of average adjusters may overcome the advantages in principle of this view, but I prefer to postpone the decision of this difficult question till it arises. In the present case in my opinion it does not, as the parties have avoided the difficulties by an agreed rule of adjustment and contribution. The person incurring the expenditure under the agreed rule runs a risk of loss which he can cover by insurance of his interest in the arrival of the interests on which he has a lien for contribution to his expenditure.

For these reasons in the result the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Holman, Fenwick & Willan.*
Solicitors for respondents: *Waltons & Co.*

(1) [1894] P. 108.

W. H. G.

NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND *v.* LINDSELL AND ANOTHER.

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Oct. 7, 13.

Bill of Sale—Document securing Repayment of Money—Assignment of personal Chattel or of Proceeds of Sale when sold—Severability—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4.

The owner of a motor-car which was in the hands of the defendant, a motor engineer, for the purpose of repairs, and which he had instructed the defendant to sell on his behalf when repaired, had an account at the plaintiffs' bank, which was overdrawn. Being requested by the plaintiffs to give security for the overdraft he wrote to the defendant a letter authorizing him "to hold the car to the order of" (the bank) "or the proceeds when sold," and sent a copy of that letter to the plaintiffs. The letter was not registered as a bill of sale. The car having been sold and the price received by the defendant, the plaintiffs claimed the proceeds:—

Held, that the letter in question created one entire charge upon the car and the proceeds which represented it, and that the equitable assignment of the proceeds could not be severed from the assignment of the car itself. The letter was consequently a bill of sale and void for want of registration and for non-compliance with the statutory form.

TRIAL of action before Lord Coleridge J.

The defendant, Lindsell, was a motor engineer and repairer of motor-cars at Tunbridge Wells. In the spring of 1919 one Welding, who owned a "Sava" car, sent it to Lindsell's works to be repaired, and instructed him to offer it for sale when finished. Welding had an account at the Tunbridge Wells branch of the plaintiffs' bank, which on August 9, 1919, was overdrawn 317*l.*, and by a letter of that date the plaintiffs' manager, Mr. Draper, agreed to allow him to overdraw a further 25*l.* on the conditions, that the whole overdraft should be repaid by September 30, that he should authorize the defendant to hold the car, or the cash if the car was sold, to the bank's order, and that he should send the bank a copy of the authority so given to Lindsell. Accordingly on August 11 Welding sent a letter of authorization to Lindsell in the following terms: "This is to authorize you to hold the Sava car at present in your hands to the order of the National Provincial and Union Bank of England, Ld., Tunbridge Wells, or the proceeds when sold after deducting your own account. (Signed) K. Welding"; and on the

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same date he sent a copy of that letter to the plaintiffs. That letter of authorization was not registered as a bill of sale. In March, 1920, Lindsell by Welding's authority sold the car for 515*l.* At that time Lindsell had executed repairs to the car costing 280*l.*, which sum was still owing to him. Lindsell received the price of the car, and thereout paid himself the amount of his charges, leaving a balance of 235*l.*, which under the terms of the letter of August 11 he ought to have handed to the plaintiffs. Welding however falsely represented to him that "he had made it all right with the bank," and that the plaintiffs were willing to be content with the payment to them of 135*l.* out of the proceeds. Lindsell accordingly remitted to the plaintiffs the sum of 135*l.* and the balance of 100*l.* he handed to Welding. The action was brought against Lindsell and Welding claiming a declaration that the plaintiffs were assignees of the proceeds of the sale of the car, and claiming payment from Lindsell of the 100*l.* so paid to Welding. Welding did not appear to the action. It was set up by way of defence on Lindsell's behalf that the letter of August 11 was void under the Bills of Sale Acts, not being registered as a bill of sale nor being in the statutory form.

Rayner Goddard and *F. J. Tucker* for the plaintiffs. The letter of August 11 was a good equitable assignment of the proceeds of sale. To constitute such an assignment it is only necessary that there should be a direction to hold a particular fund as security for the debt. It is not necessary that the fund should be in existence at the date of the direction: *Burn* v. *Carvalho.* (1) And if the document had assigned nothing more it could not possibly be open to the objection that it was void as an unregistered bill of sale. It is true that it purports also to assign the car itself until sale, and so far as it assigns the car it would admittedly be bad. But the two parts of the document are severable, and the badness of the one does not vitiate the other. In *In re Burdett* (2) a deed which was not registered as a bill of sale assigned to the grantee as security for a debt the several

(1) (1839) 4 My. & Cr. 690. (2) (1888) 20 Q. B. D. 310.

chattels specified in the schedule thereto. The schedule comprised "personal chattels" and also a gas engine which, as being "trade machinery," did not come within the definition of personal chattels. It was held that though the deed was void as to the personal chattels it was valid as to the gas engine. Again in *Brandt & Co.* v. *Dunlop Rubber Co.* (1) where the course of dealing between the assignor and the bank who financed him was for him to give them a written undertaking in each case when he sold any goods that the price should be paid direct to them, and to give them an engagement in writing that in the meantime he would hold the goods and the proceeds in trust on their behalf, the House of Lords held that there was a good equitable assignment of the proceeds to the bank although the engagement was not registered as a bill of sale; in other words they must have treated the charge on the chattels and on the proceeds as severable.

Neilson K.C. and *Jolly* for the defendant. The assignment of the proceeds of the car is not severable from the assignment of the car itself. *In re Burdett* (2) is distinguishable for there the subject matters were distinct things, whereas here they were not. One represented the other. In *Brandt* v. *Dunlop* (1) the particular document relied on as the bank's title to the proceeds of sale was in fact a later document than that referred to, and given after the goods had been sold and delivered at the purchaser's mills, so that the question of severability of the security did not arise. In *London and Yorkshire Bank* v. *White* (3) a customer of the plaintiff bank had orally agreed to assign to them certain personal chattels, then in the hands of third persons as agents for sale, as security for an overdraft. In pursuance of that agreement the customer wrote to the agents telling them that he had assigned his interest in the chattels specified in a list attached to the bank "to whom you will pay over proceeds of sale from time to time." It was contended that that letter was a bill of sale. Lord Russell C.J. treated the case as though the letter would have been a bill of sale but for the fact that there had been a previous oral assignment,

(1) [1905] A. C. 454. (2) (1888) 20 Q. B. D. 310.
(3) (1895) 11 Times L. R. 570.

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whereby the bank's title to the security was independent of the document. It was never suggested there that if it had been a bill of sale the assignment of the proceeds would have been severable from that of the chattels.

Rayner Goddard in reply.

LORD COLERIDGE J. The question that has arisen in this case is whether the plaintiffs are prevented from succeeding in the action on the ground that the document disclosed is within the purview of the Bills of Sale Act. If it is, then inasmuch as it is neither registered nor in the statutory form they cannot recover. It is clear, and indeed it is admitted, that if at the time of action brought the motor-car had not been sold it would undoubtedly have been a bill of sale and void. But it is said that as the car has been sold, so that the only claim of the plaintiffs is not to the motor-car but to the proceeds of sale, the Bills of Sale Act does not apply, for the same reason that it did not apply in *Brandt* v. *Dunlop*. (1) Here however there is not merely an assignment of the proceeds of sale of a chattel but also an assignment of the chattel itself until sold, and in my opinion you cannot split the document into two parts and discard the part that assigns the chattel merely because at the time when the plaintiffs put forward their claim the chattel has ceased to form part of the security. The proceeds of sale are only assigned along with and as representing the chattel, and the legal incidents attached to the assignment of the proceeds of sale must be held to arise out of and to be inseparable from those attached to the assignment of the chattel. In these circumstances I must hold that the document is a bill of sale, and as it has not been drawn in the form required by the statute nor been registered the title of the plaintiffs to the money fails.

Judgment for the defendant.

Solicitors for the plaintiffs: *Cox & Co., for Snell & Co., Tunbridge Wells.*

Solicitors for the defendant: *Champness & Co., for Sir Robert Gower, Tunbridge Wells.*

(1) [1905] A. C. 454.

J. F. C.

[IN THE KING'S BENCH DIVISION AND THE COURT OF APPEAL.]

K. B. D.
1921
April 22;
May 4.

C. A.
June 24, 27;
July 26.

ROBERTS *v.* ASSESSMENT COMMITTEE OF THE METROPOLITAN BOROUGH OF POPLAR.

Rating—Assessment—Beer House—Tied House—Premium on Assignment of Lease—Gross Value—Restriction on Rent—Standard Rent—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 4—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1.

Reasoning applied. RAWLANCE *v.* CROYDON CORPN. [1952] 2 Q.B. 803

By s. 4 of the Valuation (Metropolis) Act, 1869, "The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rent charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

The gross value of a dwelling house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies cannot be greater than the standard rent of the dwelling house together with the additions thereto permitted by that Act:—

So *held* by the King's Bench Division (Darling, Avory and Salter JJ.), affirmed in the Court of Appeal by Scrutton and Atkin L.JJ., Bankes L.J. dissenting; Scrutton L.J. deciding on the ground that he was not satisfied that the decision of the King's Bench Division was wrong.

SPECIAL CASE stated under s. 40 of the Valuation (Metropolis) Act, 1869.

In the quinquennial valuation list for the parish of Poplar of May, 1920, one James Roberts, hereinafter called the occupier, was assessed in respect of a beerhouse known as the "Cobden's Head" at 112*l.* gross value and 94*l.* rateable value. He objected to this assessment, and the Assessment Committee of the Borough of Poplar heard and determined the objection and increased the valuation to 118*l.* gross value and 95*l.* rateable value and redeposited the valuation list with the assessment so altered. The occupier again objected, and the Assessment Committee after hearing his objection reduced the valuation to 112*l.* gross and 94*l.* rateable value, but refused to make any further reduction.

The occupier then gave notice of appeal to the quarter

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sessions of the peace for London sitting for the purpose of hearing appeals under the Valuation (Metropolis) Act, 1869; and the parties consented, and on February 10, 1921, Bray J. in chambers ordered that a special case should be stated under s. 40 of that Act for the opinion of the King's Bench Division. The special case set out the facts and raised the questions contained in the following paragraphs :—

7. James Roberts is the occupier of the hereditament known as the Cobden's Head, and dwells therein.

8. The Cobden's Head is a house licensed for the sale of beer by retail for consumption either on or off the premises and is situate at 189 St. Leonards Road, Bromley-by-Bow, in the metropolitan borough of Poplar. The licences in respect thereof are held by the occupier.

9. By indenture of lease dated February 16, 1909, and made between Mann, Crossman & Paulin, Ld., brewers, of the one part and Emily Esther Chamberlin of the other part the hereditament was demised by the company to the said E. E. Chamberlin for a term of twenty-one years from March 25, 1909.

10. The rent reserved by the lease is 40*l.* per annum payable by equal quarterly payments. No progressive rent is reserved by the lease.

11. By the lease a further rent of 80*l.* per annum becomes payable at the option of the company if they elect to receive that rent instead of taking advantage of a forfeiture, should one occur, for the breach of the covenant in the lease contained in the paragraph next set out.

12. That covenant was that the lessee should not at any time during the term granted by the lease (except with the previous consent in writing of the company) buy receive consume sell or dispose of directly or indirectly in upon out of or about the hereditament or any part thereof any malt liquor whatsoever other than such as should have been bona fide purchased of or supplied by the company their successors in business or their appointees.

13. The further rent has in fact never been paid or demanded.

14. The lease was granted in consideration not only of the rents, covenants and agreements thereby reserved and therein contained but also of the sum or premium of 850*l.* paid on or before the execution of the lease.

15. The lease also contained a covenant by the lessee to pay and discharge all parliamentary, parochial and other taxes, rates, charges, assessments, duties, outgoings and impositions in respect of the hereditament, landlord's property tax alone being excepted, and to reimburse the lessors for the payment of fire insurance premiums.

16. The lease further contained a covenant to keep and deliver up the hereditament and all fixtures and additions thereto in good and substantial repair and condition.

17. After several mesne assignments the lease was assigned on or about November 26, 1919, to the occupier James Roberts in consideration of a sum of 1800*l.* paid by him to the assignor.

18. The lessors of the hereditament have not since August 4, 1914, incurred any expenditure on the improvement or structural alteration of the hereditament.

19. The rateable value of the hereditament on August 3, 1914, was 48*l.*, being the rateable value thereof as fixed by the quinquennial valuation list made in the year 1910.

20. A copy of the valuation list so far as the same relates to the hereditament and as altered and approved by the Assessment Committee for the quinquennial year 1920 and a copy of the notice of appeal of the occupier the said James Roberts are annexed to and form part of this case. In that list the hereditament is assessed at 112*l.* as the gross value and 94*l.* as the rateable value. By his notice of appeal the said James Roberts claims that the valuations should be reduced to 67*l.* as the gross value and 56*l.* as the rateable value.

The questions for the opinion of the Court are :—

(1) Whether having regard to the facts stated in paras. 10, 11, and 14 hereof the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, hereinafter called the Rent (Restrictions) Act, 1920, applies to the hereditament ;

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(2) Whether the Rent (Restrictions) Act, 1920, in its application to the hereditament is to be taken into account in arriving at the valuation of the hereditament under and for the purposes of the Valuation (Metropolis) Act, 1869;

(3) Whether the highest gross value which can be assigned to and placed upon the hereditament in the valuation list for the year 1920 is the standard rent within the meaning of the Rent (Restrictions) Act, 1920, applicable to the hereditament plus the highest increase or increases of rent provided for and set out in s. 2, sub-s. 1 (*c*) and (*d*), of the said Act;

(4) Whether in calculating the gross value of the hereditament the capital sum paid on the assignment of the lease can be taken into account;

(5) Whether the standard rent of the hereditament is the rent of 40*l.* payable under the lease;

(6) Whether inasmuch as on August 3, 1914, the rent of 40*l.* was less than the rateable value of the hereditament the rateable value is the standard rent;

(7) Whether in calculating the permitted increases the landlord for the purpose of the calculation is to be deemed to be responsible for all the repairs to the hereditament?

In the event of the answer to the first, second, or third question being in the negative or the answer to the fourth question being in the affirmative it is agreed between the parties hereto that the assessment the subject of this appeal shall stand both as to the gross and as to the rateable value. In any other event the assessment shall be reduced both as to gross and rateable values to such sums as may be agreed upon between the parties or failing agreement may be determined by the arbitration of a single surveyor to be nominated by this honourable Court or by such other person or method as the Court may direct.

Konstam K.C., *Wootten K.C.* and *R. Mitchell Banks* for the occupier.

Sir H. Courthope-Munroe K.C. and *S. G. Turner* for the Assessment Committee.

Cur. adv. vult.

May 4. The following written judgment was delivered by

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AVORY J. The substantial question in this appeal is whether the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in its application to a licensed beerhouse known as the "Cobden's Head" is to be taken into account in arriving at the valuation of the said hereditament under and for the purposes of the Valuation (Metropolis) Act, 1869. The Assessment Committee contend that, assuming it is established that as between landlord and tenant the Rent (Restrictions) Act applies to the beerhouse so as to prevent any increase in the standard rent as defined by the Act except such as may be permitted by s. 2 thereof during the continuance in force of the said Act, nevertheless for the purpose of assessment under the Valuation (Metropolis) Act these restrictions may be disregarded and the valuation made as it would have been made before the Act of 1920, or any of the enactments thereby repealed, by taking into account the fact that the beerhouse is a tied house, that is that all malt liquor sold or consumed in the house must be supplied or sold to the tenant by the landlords who are brewers, and the amount of any premium paid on the granting of the lease or paid by the occupier on the assignment thereof to him.

It is not disputed that the beerhouse in question is a "dwelling-house" within the meaning of the Rent (Restrictions) Act, 1920: see s. 12, sub-s. 2 (ii.), and also *Epsom Grand Stand Association* v. *Clarke.* (1) The rent reserved by the lease of twenty-one years from March 25, 1909, which was assigned to the occupier in November, 1919, is 40*l.* per annum, the further rent of 80*l.* per annum referred to in para. 11 of the special case has never in fact become payable. The rateable value of the said hereditament on August 3, 1914, as fixed by the valuation list then in force, was 48*l.* It appears therefore that for the purposes of that Act the standard rent of the house until June 24, 1923, is 48*l.*: see s. 12, sub-s. 1 (*a*), having regard to the decisions which have

(1) [1919] W. N. 170; 35 Times L. R. 525.

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established that the Act operates in rem and not in personam: *King* v. *York* (1), and that the rent there mentioned means the sum actually payable by way of rent: *Glossop* v. *Ashley* (2); *Mackworth* v. *Hellard* (3); and *Westminster and General Properties Co.* v. *Simmons.* (4) It follows that the standard rent cannot be increased so long as the Act continues in force beyond the amount permitted by s. 2, nor can any premium or other pecuniary consideration be required as a condition of the grant renewal or continuance of the tenancy or sub-tenancy for a term of less than fourteen years.

In these circumstances the Assessment Committee at the quinquennial assessment in 1920, under the Valuation (Metropolis) Act, 1869, in order to arrive at the gross value of this hereditament had to ascertain the annual rent which a tenant might reasonably be expected taking one year with another to pay if the tenant undertook to pay all usual tenant's rates and taxes, etc., and the landlords undertook to bear the costs of repairs, etc. It is not disputed that apart from the restrictions imposed by the Act of 1920, a licensed public-house or beerhouse should be assessed as if it were free from any covenant making it a tied house, as the tenant in that case would pay a higher rent, and that any premium paid on the granting or assignment of the lease should be taken into consideration, and the Assessment Committee contend that these matters may still be taken into account in arriving at the rent which a tenant would be willing to pay and have made their assessment accordingly.

The occupier on the other hand contends that the hypothetical tenant, who must be assumed to be a sensible person, cannot be expected to pay more than an Act of Parliament requires him to pay, or more than the Act permits the landlord to demand, and in support of his contention relies on the well-established principle in rating law that the valuation is to be made rebus sic stantibus: see Blackburn J. in

(1) (1919) 88 L. J. (K. B.) 839; [1919] W. N. 59.

(2) [1921] 2 K. B. 451; affirmed in C. A. ante, p. 1.

(3) [1920] W. N. 377; 37 Times L. R. 157; affirmed [1921] W. N. 108; 37 Times L. R. 469.

(4) [1919] W. N. 241; 35 Times L. R. 669.

Staley v. *Castleton Overseers* (1), and that any statutory restrictions on the profit-earning or rent-earning capacity of the hereditament must be taken into consideration.

In *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (2) the Cheshire Lines Committee contended that they were only rateable for the rent which a hypothetical tenant would give for the hereditament in question subject to the express provisions and restrictions of a private Act of Parliament, and not for the rent which a tenant entirely unfettered would give, and the Court of Appeal upheld that contention, Lord Esher M.R. saying (3): "By virtue of a private Act of Parliament the property never can, so long as that Act lasts, be of any greater annual value than 2500*l*., either to the persons in whose hands it now is, or to any one else. It was admitted in argument that, if the Act had been a public one, the property could not be valued at more than 2500*l*. a year. The property would, to use a phrase which, although it is picturesque, is not, I think, a very inaccurate one, have been 'struck with sterility' by the Act beyond the value of 2500*l*., and the only real point in the case is, whether the result is different because the Act is a private and not a public one." Then he proceeded to show that it made no difference that it was a private Act.

In *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (4) the Court of Appeal (Lord Halsbury dissenting) had held that the rent which a tenant would pay for the railway and tramway lines ought to be taken into consideration for the purpose of arriving at the rateable value even if such rent could not be legally exacted from the railway company. This view was overruled in the House of Lords, Lord Herschell L.C. saying (5): "But if tolls cannot be legally exacted, no such sum can be received. Then the question is, supposing that no tolls could be got because they cannot legally be exacted, nevertheless are you to add something to the rating already arrived at, on the ground that the existence of the railway

(1) (1864) 5 B. & S. 505, 513; 33 L. J. (M. C.) 178, 182.
(2) (1885) 15 Q. B. D. 597.
(3) (1885) 15 Q. B. D. 602.
(4) [1895] A. C. 136.
(5) [1895] A. C. 148.

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requires some addition? My Lords, I cannot myself think that it is possible, with all deference to those who have thought otherwise, to arrive at any but one conclusion upon the point, and I think that the view of the learned judges in the Court below who have decided in favour of the respondents in this appeal has resulted from a misapprehension of the decision of this House in the *Erith Case.* (1) I agree altogether with what Lord Halsbury said on this point in the Court below. We are dealing here with a profit-bearing undertaking. The parishes do not ask that the land shall be valued merely as land, or land covered with water, but they say: 'These are docks with wharves, railways, and all these adjuncts and appliances, and it is as docks capable of earning a profit that they ought to be rated. You are to find out what a tenant from year to year in view of the profits earned would be likely to give, and upon that principle they have been rated.' But then it is said: 'But they could earn more profits than they are earning, and therefore you ought to suppose that a hypothetical tenant would give more.' But if the Legislature have said they shall not earn these suggested further profits because they shall not charge tolls, how can it be established as a matter of fact that they could earn more? It appears to me that if you are to disregard such statutory restrictions as these, you might just as well say that a railway company ought not to be rated only according to the tolls which it receives—ought not to be rated even according to the tolls which it could by law receive within its maximum, but that you ought to disregard its statutory maximum and ask what a tenant from year to year would give for the railway if he could charge any tolls which he pleased."

In *Port of London Authority* v. *Orsett Union Assessment Committee* (2) Lord Buckmaster says: "The case of the *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (3) is an easier case to understand. Railway and tramway lines formed part of a dock system, but the dock companies were prohibited from taking any tolls for the use of the line. It

(1) [1893] A. C. 562.
(2) [1920] A. C. 273, 305.
(3) [1895] A. C. 136.

was held that if tolls could be exacted a tenant could be found. It was decided by your Lordships' House, reversing the judgment of the Court of Appeal, that the statutory restrictions must be considered in this connection, and the rents that would have been earned but for these restrictions ought not to be regarded. In other words that decision emphasized and made clear a principle that must always be applicable to such cases. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament."

Having regard to these decisions and to the fact that the restrictions imposed by the Rent (Restrictions) Act, 1920, attach to the house by whomsoever it may be occupied I am unable to imagine any tenant who would pay a rent for the house greater than that authorized by the Act. The result no doubt is to stereotype the assessments of all houses that fall within the provisions of the Act, notwithstanding that they may have increased in value since the previous valuation, and I doubt whether this consequence was foreseen, although s. 12, sub-s. 9, of the Act shows that the question of rating was to some extent in the mind of the Legislature; but this consideration cannot override the enactment which appears to me free from ambiguity. I think therefore that the occupier's contention prevails and that the answers to the questions for the opinion of the Court should be as follows: to (1.), (2.), and (3.) in the affirmative; to (4.) in the negative; and to (5.) and (6.), that the rateable value of 48*l.* is the standard rent. Question (7.) was abandoned during the argument.

In my opinion the appeal should be allowed with costs.

I am requested by my brother Darling to say that he has read this judgment and concurs in it.

SALTER J. I also concur with the judgment which has just been delivered by my brother Avory.

Appeal allowed.

J. R.

C. A. 1921

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The Assessment Committee appealed.

Talbot K.C., *S. G. Turner* and *A. H. Forbes* for the appellants. In the Valuation (Metropolis) Act, 1869, s. 4, the term "gross value" means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and the landlord undertook to bear the cost of the repairs and insurance, and other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

The question is, What rent might a tenant reasonably be expected to pay, taking one year with another, for this hereditament? In other words, what is the annual value of the hereditament? The definition in s. 4 of the Act of 1869 is only a method of arriving at the annual value: *London County Council* v. *Erith Churchwardens.* (1) The rent actually paid is only evidence, it is not the measure, of the annual value: *Sunderland Overseers* v. *Sunderland Union* (2); *Bradford-on-Avon Assessment Committee* v. *White.* (3) The facts, first, that the rent is the rent of a tied house and, secondly, that a large premium was paid by the occupier when the lease was assigned to him, are both properly taken into account in measuring the annual value; and there can be no doubt that, apart from the Rent (Restrictions) Act, 1920, the annual value of the hereditament would largely exceed 40*l.*, the rent payable under the lease, or 48*l.*, the rateable value in 1910, which by s. 12, sub-s. 1 (*a*), of the Act is the standard rent of this hereditament. Then does the Act affect the annual value? It was never intended to alter the principles on which the annual value of a hereditament is to be assessed for rating purposes. That still remains the annual rent which a tenant might reasonably be expected to give. The crucial question is, Could a tenant reasonably be expected to pay more than the standard rent for a hereditament which

(1) [1893] A. C. 562, 595. (2) (1865) 18 C. B. (N. S.) 531, 583.
(3) [1898] 2 Q. B. 630.

but for the Act would let at a rent higher than the standard rent? That is a pure question of fact. The Act does not forbid or disable a landlord from receiving a higher rent; it is true that he cannot enforce payment of any surplus above the standard, and it is true that if the tenant pays any surplus he may recover it. But if the tenant chooses to pay and the landlord chooses to receive a higher rent neither party is contravening the Act. That distinguishes the present case from *Hare* v. *Putney Overseers* (1); *Lambeth Overseers* v. *London County Council* (2); *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (3); and *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (4); and brings it within the well settled principle that the hereditament is to be taken as it stands: *Reg.* v. *Fletton* (5); *Staley* v. *Castleton Overseers* (6); with all its advantages and all its limitations and restrictions whether natural or artificially imposed: *Port of London Authority* v. *Orsett Union Assessment Committee* (7); and that the annual rent which a tenant may reasonably be expected to give for that hereditament is the basis of the annual value. The Divisional Court has decided the case as if the tenant was precluded from paying and the landlord from receiving any rent higher than the standard rent. Their decision is therefore wrong.

Konstam K.C., *Wootten K.C.* and *R. M. Banks* for the respondent. The argument for the appellants involves the fallacy of supposing that the annual value of a hereditament means something other than "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for" the hereditament. What annual rent can a tenant reasonably be expected to pay for a dwelling house to which the provisions of the Rent (Restrictions) Act, 1920, apply? That is the only question in this case; and the answer is, the standard rent with the additions permitted by s. 2, sub-s. 1, of the Act; that and nothing more.

(1) (1881) 7 Q. B. D. 223.
(2) [1897] A. C. 625.
(3) 15 Q. B. D. 597.
(4) [1895] A. C. 136.
(5) (1861) 3 E. & E. 450.
(6) 5 B. & S. 505; 33 L. J. (M. C.) 178.
(7) [1920] A. C. 273, 288.

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Anything above that is not rent. If a tenant thinks it worth his while to pay more than that, the surplus is not rent. The statute has deprived it of all the nature and quality of rent. It has not even the force of a gratuitous payment; for a gratuitous payment, if made deliberately, cannot be recovered back, but a sum paid by a tenant over and above the standard rent and permitted increases can be recovered back: s. 14, sub-s. 1. The effect of the Act is that beyond the standard rent and permitted additions the hereditament is struck with sterility. No landlord can ever exact more than that, and beyond that limit the case falls within the principle of *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (1) and *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull.* (2) In other words it has no gross value beyond the statutory rent and the permitted additions thereto. The appellants contend that they may take into account the payment which this or that tenant may be ready to make above the standard rent, but that is just the method of assessment they may not adopt: *Bradford-on-Avon Assessment Committee* v. *White.* (3) The hypothetical tenant is only introduced as a mode of ascertaining the existing value of the occupation to the existing occupier: *Reg.* v. *Grand Junction Ry. Co.* (4) He must not be allowed to bring in his train hypothetical competitors or to surround himself with hypothetical circumstances which may affect the rent: *Great Western and Metropolitan Rlys.* v. *Kensington Assessment Committee.* (5)

Talbot K.C. in reply. The argument for the respondent lays too much stress on the rent actually payable. The Court has no more difficulty in conceiving of a hypothetical rent than of a hypothetical tenant. In many cases there can in the nature of things be no actual rent. What rent can there be for portion of a railway running through a parish, as in *Reg.* v. *Grand Junction Ry. Co.* (6); *Reg.* v. *London and North Western Ry. Co.* (7); or *Great Central Ry.* v. *Banbury*

(1) 15 Q. B. D. 597.
(2) [1895] A. C. 136.
(3) [1898] 2 Q. B. 630.
(4) (1844) 4 Q. B. 18, 43.
(5) [1916] 1 A. C. 23, 35.
(6) 4 Q. B. 18.
(7) (1874) L. R. 9 Q. B. 134.

Union (1) ? Or what rent can there be for a churchyard : *Winstanley* v. *North Manchester Overseers* (2) ? Yet the Court finds hypothetical tenants for these hereditaments. It is not bound by the fact that there is no actual rent for the hereditament, and still less by the fact that the actual rent is restricted.

Cur. adv. vult.

July 26. The following written judgments were delivered :—

BANKES L.J. This appeal raises questions of very considerable general importance in reference to the effect which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, has upon the rateable value of premises to which that Act applies. The matter comes before the Court upon a special case stated under s. 40 of the Valuation (Metropolis) Act, 1869. The hereditament the rateable value of which is in question is known as the "Cobden's Head" beerhouse, situate in St. Leonards Road, Poplar. The house is licensed for the sale of beer by retail for consumption either on or off the premises. The house is tied to a firm of brewers, who by lease dated February 16, 1909, let the same as a tied house for a term of twenty-one years, expiring Lady Day, 1930, at a yearly rent of 40*l.* A premium of 850*l.* was paid by the tenant on the granting of the lease. In November, 1919, the respondent purchased the unexpired term for a sum of 1800*l.* ; and the lease was assigned to him. The rateable value of the hereditament on August 3, 1914, was 48*l.*, that being the value as fixed in the quinquennial valuation list made in the year 1910. In the valuation list made in the year 1920 the premises were assessed at 112*l.* gross and 94*l.* rateable value. It was against this valuation that the notice of appeal to quarter sessions was given ; and it is in reference to this valuation that the opinion of the Court is sought. By his notice of appeal to quarter sessions the respondent claimed that the said valuations should be reduced to 67*l.* gross and 56*l.* rateable. Both in the Court below

(1) [1909] A. C. 78. (2) [1910] A. C. 7.

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and in this Court the respondent contended that the rateable value could not exceed the "standard rent" of the premises as fixed by the Increase of Rent (Restrictions) Act, 1920; and could, therefore, not be more than 48*l.* with such statutory increases as that Act allows. The Divisional Court acceded to this contention; and from their order this appeal is brought.

If the view taken by the Divisional Court is correct the result is certainly startling. A tied house let on lease in 1909 for twenty-one years at a yearly rent of 40*l.* for which lease a premium of 850*l.* was paid in 1909, and 1800*l.* in 1919, and which but for the Rent (Restrictions) Act the parties do not dispute would be properly rated at 112*l.* gross and 94*l.* net, is to be reduced to the amount of the standard rent with the statutory increases, because of the passing of the Rent (Restrictions) Acts and the provisions of the Act of 1920. The material questions which the Court is asked to answer are those numbered (2.), (3.) and (4.) in the special case. They are as follows: "(2.) Whether the said Rent (Restrictions) Act, 1920, in its application to the said hereditament is to be taken into account in arriving at the valuation of the said hereditament under and for the purposes of the Valuation (Metropolis) Act, 1869? (3.) Whether the highest gross value which can be assigned to and placed upon the said hereditament in the said valuation list for the year 1920 is the standard rent (within the meaning of the said Rent (Restrictions) Act, 1920) applicable to the said hereditament plus the highest increase or increases of rent provided for and set out in s. 2, sub-s. 1 (*c*) and (*d*), of the said Act? (4.) Whether in calculating the gross value of the said hereditament the capital sum paid on the assignment of the said lease can be taken into account?" In the event of the answers to either the second or third questions being in the negative or to the fourth question in the affirmative, the parties are agreed that the assessment the subject of the appeal shall stand both as to the gross and rateable value.

The really important question, and the one which the

Divisional Court dealt with, is the third. I do not understand why it was considered necessary to introduce the second question. It seems to me obvious that even if the Rent (Restrictions) Act, 1920, does not fix the rateable value of the premises by limiting it to the amount of the standard rent, the Act must necessarily be taken into account in arriving at the valuation of the hereditament. How much effect is to be given to its provisions, must be a question for the valuer; but it seems to me impossible, when assessing the rateable value of the premises, to ignore a statute which, so long as it remains in force, may materially affect the value of properties to which it applies.

The third question raises the real point in contest between the parties; and the answer to the question depends, in my opinion, upon whether the true effect of the Rent (Restrictions) Act, 1920, is to fix and not merely to affect the value of these premises for rating purposes. The answer to this question must depend upon what is the true construction of the Act read as a whole. If its effect is to render it illegal, and consequently impossible, for any higher rent than the standard rent to be paid or received for premises to which the Act applies, then the principles of the *Sculcoates Case* (1) and *Mayor of Lincoln* v. *Holmes Common* (2) would in my opinion apply; and the rateable value could not be fixed higher than the standard rent. In the case of houses erected or reconstructed into flats or tenements since April 2, 1919, the Act does, by s. 12 (*a*), fix their gross value for rating purposes. Except in this instance, no mention is made in the Act as to what the gross or rateable value of houses to which it applies is to be. It leaves the rateable values to be fixed in accordance with the law as existing at the time of the passing of the Act.

The first question to be determined is whether the Act does or does not render the receiving and paying of a rent for the premises in question in excess of the standard rent illegal and for the present purpose therefore an impossibility. In my opinion it does not. A landlord may not exact, and

(1) [1895] A. C. 136. (2) (1867) L. R. 2 Q. B. 482.

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a tenant need not pay, more than the standard rent; and if the tenant does pay more, he can recover it back from the landlord. It becomes a question for the valuer under these circumstances to estimate what rent a tenant would volunteer to pay for the occupation of these premises. It cannot in my opinion be asserted as a matter of law, in answer to the third question in the special case, that the highest gross value which can be assigned to and placed upon the hereditament in question for the year 1920 is the standard rent plus any statutory addition allowed by the Act.

It is said, however, that even if this view of the effect of the Act is correct, it does not assist the appellant's case, because the test, and the only test, of gross and rateable value is that contained in s. 4 of the Valuation (Metropolis) Act, 1869, which defines gross value as "the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent"; and rateable value as "the gross value after deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid." There is no material distinction between this definition of rateable value and that contained in the Parochial Assessment Act, 1836. The argument founded on these definitions was put in this way. It was said that the statutory test is the rent which a tenant will pay; even assuming that in spite of the Rent (Restrictions) Act a tenant could be found to make a voluntary payment in excess of the standard rent in consideration of being allowed to occupy the premises as a tenant from year to year, still such a payment is not a rent within the meaning of the definitions above referred to, and cannot therefore be taken into account in assessing the gross or rateable value of these premises; indirectly, therefore, if not directly, the Rent (Restrictions) Act does fix the rateable value of these premises

at or below the standard rent. The answer to this argument appears to me to be, that the definition of gross and rateable value in the statutes I have referred to has never been read literally. If it had, the many decisions on rateability of premises which are to be found in the reports could never have been given. Lord Herschell's well-known dictum in the *London County Council* v. *Erith Churchwardens* (1), that the words in the Parochial Assessment Act, 1836, which follow the expression "annual value," only provide a means of arriving at what is the annual value of the premises, explains why it is that the Courts have always been prepared to assume the existence not only of a hypothetical tenant, but of a hypothetical state of things, and a hypothetical rent, in order to enable the value of premises which are capable of beneficial occupation to be arrived at for rating purposes. Hence, we find that the property to be rated must be assumed to be let; and the fact that it is occupied by the owner is immaterial: *Erith Case.* (2) All possible occupiers including the actual occupier must be taken into account as possible tenants: *Reg.* v. *London School Board.* (3) An actual occupier who is prohibited by statute from being tenant must not be excluded from consideration: *Erith Case.* (4) In the ordinary case of the rating of railways the definition is applied, though the railway cannot let its undertaking, or any part of it; nor could any tenant pay a sum of money for the occupation of the undertaking or any part of it, which could be recovered by process of law as rent. Similarly in *Winstanley* v. *North Manchester Overseers* (5) the parson could not let the churchyard, and the sum of money which the hypothetical tenant was assumed to be prepared to pay for standing in the parson's shoes, was neither rent, nor in the nature of rent. Lord Atkinson in that case (6) states that there were three questions for consideration: "(1.) Does the appellant occupy this cemetery for which he is rated? (2.) If he does, is his occupation a beneficial one, that is, a thing of value?

(1) [1893] A. C. 562, 595.
(2) [1893] A. C. 596.
(3) (1886) 17 Q. B. D. 738.
(4) [1893] A. C. 562.
(5) [1910] A. C. 7.
(6) [1910] A. C. 12.

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(3.) What is the measure of that value?" With regard to the last, which is for the present purpose the important one, he says (1): "Whether this occupation is a beneficial occupation—a thing of value within the meaning of the statute of Elizabeth—or not depends upon whether the occupier is or is not by law debarred from deriving any benefit from it. If it is merely by his own volition, and not by the law, that he is deprived of a benefit which he might have received, then there is a 'potential beneficial occupation,' and he is liable to be rated in respect of it: *Putney Bridge Case* (2) approved of in *Lambeth Overseers* v. *London County Council.* (3) It is clear, I think, in the present case that the appellant is not debarred by law from deriving some benefit from his occupation of the graveyard. His occupation of it is therefore beneficial. If so, he is rateable in respect of it, at least to some extent. The real question, however, remains: Does he receive these burial fees by reason of his occupation? Are they 'incidental' to his occupation and the fruit of it, so that without it he could not exact them? For the purposes of this question it is, I think, immaterial what the precise legal nature of the right and interest acquired by the so-called purchase of graves may be; whether it be the ownership of a particular portion of the soil of the churchyard, or an easement of the nature of a perpetual and exclusive right of interment in that portion of the soil, or merely a like easement for a limited time, namely, till the remains of the deceased sink into dissolution and return to earth, is a matter of indifference, provided only the rector confers those rights for which he receives fees, as 'incidental' to his occupation of the burial ground." And again (4): "It was further urged on behalf of the appellant that the burial ground was impressed with a trust for the benefit of the inhabitants of the parish, but that has long ceased to be a ground of exemption, unless the terms of the trust are such as to debar the occupier from receiving any benefit or profit from the occupation: *Mayor of Lincoln* v. *Holmes*

(1) [1910] A. C. 15.
(2) 7 Q. B. D. 223.
(3) [1897] A. C. 625.
(4) [1910] A. C. 17.

Common (1); *Rex* v. *Sudbury Corporation* (2); *Jones* v. *Mersey Docks and Harbour Board.* (3) Where the occupation is such that it produces profit, it is immaterial whether the profit is retained by the occupier for his own benefit or is paid over by him to others."

It seems clear that Lord Atkinson in these passages is assuming that the parson's profit is something the value of which can be tested by the statutory definition of rateable value, though as a matter of fact any question of rent in any strict legal sense of that expression in relation to the profit could never arise. In the *Mersey Docks Case* (4) Lord Chelmsford expresses his opinion thus: "I am of opinion that, under the words of the 43 Eliz. c. 2, every occupier of a tenement yielding profit is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance." This opinion is expressed in relation to an undertaking in respect of which no rent could ever be legally demanded or paid. I cannot find any case in which objection has been taken to the rateability of premises on the ground that the sum of money which the hypothetical tenant is assumed to be prepared to pay for the right to occupy the premises is not technically rent. On the contrary, the expression "rent" in the statute appears never to have been construed in its technical sense, but to have been treated as an expression descriptive of the sum of money which the hypothetical tenant would be prepared to pay for the right to occupy the premises. In the *Sculcoates Case* (5) there is a dictum by Lord Herschell which has, I think, a direct bearing on the contention that at any rate when the statute refers to rent it refers to a payment legally enforceable. In that case the statute prohibiting the charging of tolls was passed in 1861. In spite of that statute the railway company had for five years ending December, 1890, voluntarily paid a sum of 5000*l.* a year to the dock

(1) L. R. 2 Q. B. 482.
(2) (1823) 1 B. & C. 389.
(3) (1865) 11 H. L. C. 443.
(4) 35 L. J. (M. C.) 1, 30; 11 H. L. C. 443, 521.
(5) [1895] A. C. 136, 150.

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company for the user of the railway. On this point Lord Herschell (1) says: "My Lords, it has been ingeniously pointed out that although it may be that the dock company could not charge tolls to the North Eastern Railway Company, they did in fact receive a sum of money from them for a considerable time. Well, my Lords, during that time it may be that it ought to have been taken into account. But the case finds that, for a year or two before this question arose, they had not been receiving it, and the question left to us is: What is to be the case where toll cannot be legally exacted?"

The conclusion at which I have arrived upon the whole case is, that though the Rent (Restrictions) Act, 1920, may affect the rateable value of these premises, it does not fix the rateable value, and that any voluntary payment for the occupation of the premises in excess of the standard rent which a tenant might be expected to make can be taken into consideration in arriving at what the gross and rateable value of the premises should be. For these reasons I consider that the answer to the third question should be in the negative and the fourth in the affirmative and that the order of the Divisional Court should be set aside and the appeal should be allowed with costs here and below.

SCRUTTON L.J. This appeal adds another case to the number which have recently come before us in which it was apparent that the Rent (Restrictions) Acts had been passed without any careful consideration of the effect which their provisions would have on important branches of the laws of the realm.

A public-house in Poplar was let before 1914 at a rent of 40*l.* per annum, with a tie as to liquors to be consumed therein, and a premium of 850*l.* The rateable assessment was then 48*l.* In 1919 the respondent was willing to pay 1800*l.* for the assignment of this lease, having still eleven years to run. In May, 1920, the Assessment Committee assessed the premises at 112*l.* gross, 94*l.* net value. The respondent

(1) [1895] A. C. 150.

asked that the figures of assessment should be reduced to 67*l.* and 56*l.* respectively, apparently arriving at the figures by adding the permissible increases under the Rent (Restrictions) Act to the standard rent under that Act, and arguing that as the test of gross value was "the annual rent which a tenant might reasonably be expected taking one year with another to pay for a hereditament," and as no tenant could be reasonably expected to pay more than the Rent (Restrictions) Act required him to pay, particularly as if he paid the excess he could recover it back, the effect of the Rent (Restrictions) Act was to limit assessments to the standard rent with permissible increases. The Divisional Court accepted this view, and the Assessment Committee appeals.

The Parochial Assessments Act, 1836, takes as the basis of the net annual value of the hereditaments to be assessed "the rent at which the same might reasonably be expected to let from year to year." The Valuation (Metropolis) Act, 1869, is to the same effect. When this test is applied to the numerous subject matters to be assessed the "hypothetical tenant" whose rent is to be the measure has become very far removed from reality. Was consideration to be given to an owner in occupation, who would not take a lease from himself; who occupied for public purposes premises that no one else wanted, and from which he could not make a profit, and who was in law prohibited from taking a lease from himself or from any one else? The Court of Appeal in *Owens College* v. *Chorlton-upon-Medlock Overseers* (1), following the strict language of the Act, thought that such an owner could not be considered as a tenant, which the Act of Parliament said he could not be. But the House of Lords in *London County Council* v. *Erith Churchwardens* (2) disapproved of this decision. The hypothesis had to divest the owner of his ownership and of the legal inabilities imposed on him by statute. The thing to be considered was the value of his beneficial occupation, not the profit that he made which might be nothing, or whether any other person would find value in the ownership, and this value was to be

(1) (1887) 18 Q. B. D. 403. (2) [1893] A. C. 562, 596.

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tested by what he amongst other persons would pay as rent for the hereditament, if he could and did occupy it as a tenant. The statutory restriction on him was not to be considered. On the other hand, for some purposes statutory restrictions had to be considered. When the owner was occupier of premises which did bring profit, one way of testing what he would give for them as rent if he had to be a tenant would be to ascertain the receipts and expenditure of his occupation, so as to measure what he could afford to pay after deducting a tenant's profit: *Port of London Authority* v. *Orsett Union Assessment Committee.* (1) And in calculating his receipts, it was necessary to consider any statutory restrictions on the amounts he could receive. This seems to be the reason of the decisions in the *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (2); *Reg.* v. *Fletton Overseers* (3); and *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull.* (4)

The question then seems to be, are the statutory restrictions imposed by the Rent (Restrictions) Act restrictions that can be disregarded, as in the *Erith Case* (5), where a tenant was considered who could not legally enter into a tenancy, or in the case of the burial ground: *Winstanley* v. *North Manchester Overseers* (6), where a hereditament was assessed which could never legally be let; or are they restrictions that must be taken into account, as showing that the occupier could never get more than a certain value from the property, as in the railway cases cited—or would never have to pay more than a certain amount for his occupation of the property? The real question as laid down by Lord Herschell in the *Erith Case* (5) is the value of the beneficial occupation to the occupier, tested by what he or others would pay to secure that value, if they had to and could legally pay it. Lord Herschell says that the true test is "whether the occupation be such as to be of value." (7) Or again (8): "the words in the statute of Will. 4 which follow the expression

(1) [1920] A. C. 273.
(2) 15 Q. B. D. 597.
(3) (1861) 30 L. J. (M. C.) 89.
(4) [1895] A. C. 136.
(5) [1893] A. C. 562.
(6) [1910] A. C. 7.
(7) [1893] A. C. 591.
(8) Ibid. 595.

'annual value,' only provide a means of arriving at what is the annual value of the premises." Lord Haldane in the *Orsett Union Case* (1) says that "the true test is not whether pecuniary profit can be made out of the occupation, but what is its value to the person concerned measured, I think, simply by what he would be willing to give in order to obtain it." Now we know from the special case what the appellant here was willing to give to obtain this occupation. For the right to occupy at a rent of 40*l.* for eleven years, he was willing to pay 1800*l.* down. The truth is that the value of the beneficial occupation of a house as to which a tenant is willing to pay 1800*l.* for the privilege of occupying at a rent of 40*l.* a year and submitting to a tie, is much more than 40*l.* a year, or the 48*l.* assessment in 1914. The question is whether Parliament by fixing the maximum rent which can be legally demanded has also fixed the maximum value of the beneficial occupation for rating purposes.

It is notorious that one effect of the Rent (Restrictions) Act has been that some landlords decline to let, but will only sell, there being then no statutory restriction on the price asked or paid. If the new purchaser buys to let, he will no doubt consider the statutory restriction on the rent he may demand; but if he buys to occupy, the rental restriction is immaterial to him; the price he gives is the measure of the value of his beneficial occupation. This may be so in fact and business, but what is the effect of the conventional test to be applied by the rating statutes that the value is to be ascertained by the annual rent which a tenant might reasonably be expected to pay? This can sometimes be got at by comparing the actual rents paid for the house in question and similar houses, though it is agreed that the actual rent paid is not conclusive, as it may be more or less than the real value. Where there are no rents of similar premises, but the hereditament yields profits, the hypothetical rent may be got at by comparing the estimated receipts, after considering any statutory restrictions on them, with the estimated outgoings, other than rent. This process will

(1) [1920] A. C. 273, 288.

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leave a margin of profits which is to be divided into tenant's profits: *Orsett Union Case* (1); and landlord's rent. The division between them would be settled by the higgling of the market. Where no profits can be made, the hypothetical rent is got at by finding the amount it cost the occupier to construct or acquire the hereditament, and taking a percentage in the nature of interest on this as the rent he would give if he could legally do so, which he could not, and if he had to be a tenant though he had not any such necessity. In none of these cases up to the present time has any statutory restriction on the actual rent been considered; all statutory restrictions at present given effect to are on the receipts from the beneficial occupation. Statutory restrictions on the possibility of paying rent have up to the present been disregarded.

It is clear that before the Rent (Restrictions) Act the Assessment Committee could regard the tie and the premium and disregard the actual rent paid. Though Parliament, which took away from the landlord the increased value of his property due to the war, may also have intended to take away from the community the benefit of this increased value in rating, I do not myself see in the Rent (Restrictions) Acts any trace that they considered the point, but the question still remains to be faced, whether the statutory restriction on the amount of rent that can be required forces the Assessment Committee, obliged to take as their measure of value the rent that a tenant might reasonably be expected to pay, to hold that no reasonable tenant will pay more than he is obliged by law to pay. On the one hand the payment of 1800*l.* shows me that the tenant's proposed valuation is much less than the real value of his beneficial occupation. On the other hand it may be that the fault is with a rateable valuation fixed much too low in 1910 or 1914; it may be that Parliament which had deprived the landlord of increased value during the war did not intend that increased value to have any effect on the rating assessment.

I have felt the greatest difficulty in making up my mind

(1) [1920] A. C. 273.

on the question, for, to use a colloquialism, the result of the Divisional Court judgment does not look right. It may be that as one of my brothers says "hard cases make bad law" —but it is also frequently true that when law looks wrong, it is because one misunderstands the law, though I am not sure that this is true of statute law.

In the end, the appellants have to satisfy me that the judgment of the Divisional Court is wrong. I have great doubts whether it is not wrong, but I am not satisfied that it is, and in that case the appeal must be dismissed. I do not pretend that the result is satisfactory, but it exactly represents the state of my mind after much consideration; and it is better to set down accurately what I think than to pretend to have a clear opinion on the subject, which I have not. My only consolation is that I do not think Parliament thought about the matter at all.

ATKIN L.J. This case raises a question of considerable importance whether the provisions of the Rent (Restrictions) Act, 1920, are to be taken into account in ascertaining the rateable value of houses to which the Act applies. If the decision in the case did no more than affect the occupier of the particular premises concerned, I should content myself with saying that I entirely agree with the judgment of Avory J. in the Court below in which Darling and Salter JJ. concurred. But the point raised is not confined to this particular licensed house, or to licensed houses in general, whether tied or otherwise. It extends to every dwelling house within the purview of the Rent (Restrictions) Act. The contention of the appellants is that assessment committees in fixing the rateable value of such houses are not bound by the standard rents, increases above which are not to be enforceable, and are not even permitted to take the Act into consideration. I think that they are wrong on both points.

The argument for the appellants was that the object in fixing the rateable value was to tax the value of the occupation to the occupier; and that the definition of gross value in the Valuation (Metropolis) Act, 1869, was merely one

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means of ascertaining the true value of such occupation. Statutory restrictions as to rent, therefore, are to be ignored. If the Legislature enables the occupier to hold his premises on more favourable terms than he would be subject to without legislation it may make him a present of part of the true value, but his good fortune in that respect does not avail him in questions of rating. He must share his advantage with his less favoured neighbours. It is therefore necessary to inquire what the true value is of the occupation of the premises. For this purpose I gather that the appellants are prepared to adopt the statutory definition properly understood. The competition for houses temporarily suspended by the Rent (Restrictions) Act must be hypothetically restored; and in those happy conditions the assessment committees must estimate the true rent according to the statutory formula. The appellants' attachment to the statutory definition was fickle—now they would and then they wouldn't. But in truth they have no option. The whole procedure is statutory. By s. 6 of the Act of 1869 the overseers are to make a valuation list in accordance with the Act, and by s. 51 the valuation list is to be in accordance with the schedule. By s. 4 gross value and rateable value are defined and I regret to have to repeat the well known definition of gross value: "The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." That definition appears to me to afford the only method of ascertaining gross value. It has proved difficult to apply to various public undertakings, water pipes, sewers, railways, docks and the like, and various conventions have been adopted for the purpose of applying the statutory provisions to them. But there has never yet been a case in which the ultimate test has not been what is the annual rent which a tenant from year to year could

reasonably be expected to give. Estimates of profits, or of interest on cost, are only relevant to the question of the annual rent. I am satisfied that Lord Herschell in *London County Council* v. *Erith Churchwardens* (1), referring to the statute of Will. 4 (the Parochial Assessments Act, 1836), never meant to countenance the view that the sole test in the metropolis is not to be found in the statutory definition in the Valuation (Metropolis) Act, 1869. How then is the annual rent to be ascertained ? It is obvious that the definition presupposes that the premises are deemed to be vacant and are deemed to be capable of being let. Any restriction upon the owner in respect of the power to let must by the very force of the definition be excluded. Thus the owner who does not desire to let, or who by the nature of the grant to him has no power to let, or who by statute is forbidden to let, is still rateable. Moreover the definition requires that he shall be deemed to be a possible tenant notwithstanding that he is already possessed of the property by statute or otherwise and that his powers of taking that property on an annual agreement are restricted or destroyed by statute or otherwise. This is the decision in the *Erith Case* above cited (2) following and followed by numerous authorities. But the principle of these cases is confined to freeing the owner from restrictions for the purpose of obtaining a hypothetical landlord and putting the owner in the class of hypothetical tenants. When this is done the principle is clear. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands with all its privileges, opportunities and disabilities erected or imposed either by its natural position or by the artificial conditions of an Act of Parliament : per Lord Buckmaster in *Port of London Authority* v. *Orsett Union Assessment Committee.* (3) If a general statute prevents some or all persons from taking such a hereditament that fact will be taken into account. If it restricts them in the enjoyment of such a hereditament that also will be taken into account. Any similar common law

(1) [1893] A. C. 562, 595. (2) [1893] A. C. 562.
(3) [1920] A. C. 273, 305.

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prohibition will have a similar effect. The case of the consecrated burial ground much relied on by the appellants exactly illustrates the point. The rector being in beneficial occupation must be deemed to be capable of letting the burial ground. He must also be deemed to be a possible tenant. But it is a burial ground with the restrictions upon its use that is the hereditament to be let. No member of the public may use it otherwise than as a burial ground. The only factor, therefore, to be taken into consideration in fixing the hypothetical rent is the fees that may be derived from its use as a burial ground. That is the case of *Winstanley* v. *North Manchester Overseers.* (1) If the hereditament is a railway then the only possible hypothetical tenants are those who possessing statutory powers to use that railway are likely to be competitors for it. "It would be wholly illegitimate to find that a section of a line of railway has now a competitive value because it might, if existing conditions were radically changed by legislation, have that value": per Lord Atkinson in *Great Western and Metropolitan Rlys.* v. *Kensington Assessment Committee.* (2) So, if you desire to ascertain what rent will be given for a public undertaking, you will have to look to the profits that may be made, and if an Act of Parliament limits the profits then the rent will be limited accordingly: *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull.* (3) This case appears to me to be a direct decision that a statute affecting rent must be taken into account by the Assessment Committee: "The question is whether you are to consider the profits which it might earn if a state of things existed which does not exist, or whether you are to consider the profits which it can earn under the only conditions under which it is allowed to earn profit at all. My Lords, it seems to me that the latter is the state of things which must be taken into account, and that any other course would lead not only to absurdities, but to the gravest injustice as regards the rating imposed." That is from Lord Herschell's judgment. (4) Remembering that profits are only relevant so

(1) [1910] A. C. 7.
(2) [1916] 1 A. C. 23, 43.
(3) [1895] A. C. 136.
(4) [1895] A. C. 150.

far as they affect rent I find this case conclusive of the present matter.

Applying the principles discussed above to the present case, the first question to be answered in the special case is (2.) Whether the said Rent (Restrictions) Act, 1920, in its application to the said hereditament is to be taken into account in arriving at the valuation of the said hereditament under and for the purposes of the Valuation (Metropolis) Act, 1869? In my opinion this question only admits of an affirmative answer. "The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that apart from the decisions, as to which I will say a word presently, all that could reasonably affect the mind of the intending tenant ought to be considered." That is from the judgment of Lord Halsbury in *Cartwright* v. *Sculcoates Union*. (1) To suggest that in the present time the mind of an intending tenant of a house to which the Rent (Restrictions) Act applies would not be reasonably affected by the provisions of the Rent (Restrictions) Act appears to me to border upon the ridiculous. I have already said that in my view the decisions so far from indicating a contrary view affirm the necessity of taking such provisions into consideration. I need say no more upon this question.

The second question, No. 3 in the special case, is Whether the highest gross value which can be assigned to and placed upon the said hereditament . . . . is the standard rent plus the highest increases of rent provided for in s. 2, sub-s. 1 (*c*) and (*d*), of the said Act? In my opinion the answer is again in the affirmative. I have already referred to *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (2), which seems to me to admit of but one answer to this question. If no higher rent than the standard rent and statutory increases is enforceable, as a matter of common sense that seems to be the limit of the rent a tenant can be reasonably expected to give. But it is suggested the tenant is not prohibited from giving or

(1) [1899] 1 Q. B. 667, 673. (2) [1895] A. C. 136.

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the landlord from receiving more than the standard rent; all that is provided is that the excess shall not be enforceable; the Assessment Committee may consider that the demand for houses may lead the willing tenant to offer and the landlord to accept an increase above the standard rent which both parties will know to be unenforceable but which will still be paid; and in this particular case, seeing that a large premium was recently paid for the lease, it is said that such an agreement might readily be inferred. I think that the answer is that when the Valuation (Metropolis) Act speaks of rent it means rent, a sum legally enforceable; and is not contemplating a sum legally enforceable plus a voluntary gift; still less a voluntary gift which after payment can at any time be recovered back. It is unnecessary to go so far as to say that rent is used in the strictest sense, as something that issues out of the land and for which there is a right of distress. There are subjects which are rateable, some by statute, such as tithes, and sporting rights, as to which rent is used in a less restricted sense. But I am satisfied that it at any rate involves a payment which there is a legal right to enforce, which gives rise to a debt, and I cannot construe the definition of gross value in the Act except in reference to definite legal obligations. If overseers or assessment committees are allowed to stray into the sphere of non-legal relations, the ratepayer may well despair. Certainly the law of rating will present new problems. The fact is that the present case undoubtedly is an extreme instance of the benefit conferred on existing occupiers by the Rent (Restrictions) Act. It is just the hard case that affords a temptation to lay down bad law. It combines the special anomaly of the tied rent or rather a low rateable value being the measure of the standard rent together with the emphatic proof of special value afforded by the large premium. But the principle is the same for ordinary dwelling houses as for tied houses. I myself do not believe that the Legislature intended rating authorities any more than landlords to benefit by the unrestricted competition for small dwellings that has been regulated by the Acts. I see

evidence in support of this in s. 9. But in any case I think that existing principles must be maintained; that we are not at liberty to depart from the statutory definition of gross value because we do not like its results, and therefore I come to the conclusion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *E. J. Marsh.*

Solicitors for respondent: *Maitland, Peckham & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

SUMNER PERMAIN AND COMPANY *v.* WEBB AND COMPANY.

[1920. S. No. 1836.]

Sale of Goods—Sale by Description—Implied Warranty of merchantable Quality—Goods not lawfully saleable in Country of known Destination—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14, *sub-s.* 2.

The expression "merchantable quality" in s. 14, sub-s. 2, of the Sale of Goods Act, 1893, which provides that "Where goods are bought by description from a seller who deals in goods of that description .... there is an implied condition that the goods shall be of merchantable quality," does not include the quality of being legally saleable in the market for which they are intended.

The defendants, manufacturers of mineral waters, sold to the plaintiffs a quantity of tonic water, under the description of "Webb's Indian Tonic," to be delivered f.o.b. London. The water, as the defendants knew, was bought for the purpose of shipment to the Argentine. Among the ingredients of the water there was, unknown to the plaintiffs, a certain percentage of salicylic acid. By a law of the Argentine the sale of any article of food or drink containing salicylic acid was prohibited, but the defendants had no knowledge of that law. On the arrival of the water in the Argentine the authorities, finding that it contained salicylic acid, condemned it as unfit for human consumption. In an action for breach of the contract of sale:—

Held, that the fact that by reason of the local law the water was unsaleable in the country in which the defendants knew that it was intended to be sold was not a breach of the implied condition that it should be of "merchantable quality."

APPEAL of defendants from the judgment of Bailhache J. at the trial of the action.

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The defendants were mineral water manufacturers in London and among the mineral waters manufactured by them was one which was known as "Webb's Indian Tonic," and was largely consumed in hot climates. The plaintiffs were merchants carrying on business at Buenos Aires, and had for some years prior to 1919 acted as the defendants' agents in the Argentine for the sale of their Indian tonic. The agreement under which they had so acted having expired at the end of 1918 the defendants by an agreement in writing dated February 7, 1919, appointed the plaintiffs their sole agents for the sale of "their speciality beverage called or known as Webb's Indian Tonic" in the republics of Argentine and Uruguay. By that agreement all dealings between the parties were to be "by way of out and out sale f.o.b. London." In pursuance of that agreement the defendants sold to the plaintiffs two thousand cases of bottles of their Indian Tonic for shipment to Buenos Aires and for consumption in those republics. The Indian Tonic was a secret preparation the ingredients of which were unknown to the plaintiffs. Among those ingredients there was, and always had been since the defendants first manufactured it, a certain percentage of salicylic acid—that is to say .0005 per cent. By a law of the Argentine which had been in force for some years the sale of an article of food or drink intended for human consumption which contains salicylic acid even in such small proportions as above mentioned is prohibited. The two thousand cases were shipped to Buenos Aires in the months of November, 1919, and January and February, 1920. When the goods arrived the Argentine authorities caused the liquid to be analysed and at first passed it as fit for human consumption and as not containing any objectionable ingredient, but subsequently they had it analysed again and finding that it contained salicylic acid withdrew the certificates of fitness that they had previously given and condemned the whole of it as unfit for human consumption. This was the first occasion on which they had made any objection to the defendants' tonic, and though as stated above it had always contained the

same percentage of salicylic acid they had always previously passed it without complaint. In these circumstances the plaintiffs brought this action for damages for alleged breach by the defendants of their contract in two respects. They claimed first that they had committed a breach of the implied condition, specified in s. 14, sub-s. 1, of the Sale of Goods Act, 1893, that the goods should be reasonably fit for the purpose for which they knew that they were required, that is to say sale and consumption in the Argentine; and secondly that they had broken the implied condition specified in s. 14, sub-s. 2, that the goods should be of merchantable quality.

Bailhache J. decided in the plaintiffs' favour on both points. (1)

The defendants appealed.

R. A. Wright K.C. and *Haydon* for the defendants. If this was a sale by description the condition that the goods should be of merchantable quality was performed. These goods were and are merchantable everywhere except in the Argentine. They would be merchantable there but for the statute forbidding the sale in that country of articles of food or drink containing salicylic acid. It cannot be that a seller of goods f.o.b. to a foreign buyer warrants that a foreign legislature will not have prohibited the sale of the goods when they arrive. The foreign legislature may have restricted

(1) The arguments and the portions of the Lords Justices' judgments relating to the first point have been omitted from this report for the following reason: Sub-s. 1 of s. 14 requires that the circumstances attending the notice to the seller of the purpose for which the goods are required must be such as "to show that the buyer relies on the seller's skill or judgment." Having regard to the fact that the plaintiffs had for years sold this tonic water in the Argentine without any objection, their Lordships declined to draw the inference of fact that the plaintiffs relied on the defendants' judgment for the assumption that the sale of the water was not prohibited by the law of that country. That finding of fact rendered it unnecessary for the Court to express any opinion upon the further question argued by the defendants that even if there was in other respects a breach of the implied condition of fitness the water was sold under a "trade name"—namely, "Webb's Indian Tonic," and consequently the defendants were protected by the proviso to sub-s. 1.

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the sale for purposes of revenue, or to protect the manufacturers of the country. An English vendor is not bound to inform himself of the Customs' regulations of his purchaser's country. Suppose that the sale was of alcoholic liquor and the foreign legislature was endeavouring to enforce total abstinence on its subjects, the vendor could not be bound to indemnify the foreign purchaser who fails to sell the wine or spirits because of a statutory prohibition of his own government. The condition of merchantable quality is not concerned with contingencies such as these. The purchaser may have made an error in judgment; he may have mistaken the tendency of the market; he may have bought in expectation of a demand goods for which there turns out to be no demand, and when the goods arrive there may be no market for them. But they may still be of merchantable quality within the meaning of s. 14, sub-s. 2. To hold otherwise would be to make the vendor insure the purchaser against his own want of judgment.

Schiller K.C. and *H. G. Robertson* for the plaintiffs. This was a sale by description. "Indian Tonic" is descriptive of the article sold just as "corkscrew twills" was descriptive of the worsted coatings in *Drummond* v. *Van Ingen*. (1) Where a vendor sells goods by description for resale in a particular market he impliedly warrants that they are merchantable under that description in that market. This was the view taken by the Law Lords in *Drummond* v. *Van Ingen* (1) with respect to goods known to be bought for a particular purpose, and the same principle must apply when the goods are known to be bought for a particular market. Lord Herschell says that: "There is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used. I think too that where the article does not comply with such a warranty it may properly be said to be unmerchantable in the sense in which that word is used in relation to

(1) (1887) 12 App. Cas. 284, 288, 293.

transactions of this nature." And Lord Selborne says that the implied warranty of merchantableness applies to a case in which "the goods, being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect . . . . which renders them unfit for the market for which they were intended." The fact that the goods are saleable elsewhere is not relevant where they are sold for a particular market. *Niblett* v. *Confectioners' Materials Co.* (1) is directly in point in the plaintiffs' favour. There the contract, which all three members of the Court held was to be found in the written documents alone, was for "sweetened full cream condensed 1919 season's milk—quality equal to Federal standard." That was the whole description. It was no part of the contract that it should be of any particular brands. The sellers delivered milk which answered the description in the contract in every respect, and if the tins containing the milk had borne no labels at all no possible objection could have been taken to the delivery. But unfortunately they bore labels which were an infringement of another firm's registered trade mark, whereby the goods were unsaleable except at the risk of exposing the purchasers to an action. There was however nothing objectionable in the labels themselves apart from the fact that they were a breach of the law. Yet it was held by two members of the Court that by reason of the tins bearing that label the goods were not of merchantable quality. That could only mean that the sellers had warranted that the goods delivered in satisfaction of the contract should not be such as to expose the buyers to litigation. It is difficult to see what distinction can be drawn between that case and the present. Just as the objection to the presence of the salicylic acid in the tonic here was that it rendered the purchaser liable to prosecution, so the objection to the presence of the label on the tins in *Niblett's Case* was that it rendered

(1) [1921] 3 K. B. 387, 395.

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the buyer liable to an action. If that objection caused the goods to be of an unmerchantable quality in the one case it must equally do so in the other.

BANKES L.J. The question which we have to decide under s. 14, sub-s. 2, is whether the fact that the defendants' tonic water was unsaleable in the Argentine in consequence of its containing a certain percentage of salicylic acid was a breach of the implied condition that it should be of merchantable quality. The sub-section provides that: "Where goods are bought by description"—which these were—"from a seller who deals in goods of that description"—which was the case here—"there is an implied condition that the goods shall be of merchantable quality." I emphasize the fact that the condition is not that the goods shall be "merchantable," but that they shall be of "merchantable quality," and that it is more restricted than it would have been if it had required that the goods should be merchantable. On the other hand the statute by the definition clause, s. 62, somewhat extends the natural meaning of the word "quality," for it defines it as including the "state or condition" of the goods. Now I do not propose to attempt a definition which would include every possible case; it is enough for me to say that in my opinion it is impossible to bring within the expression "merchantable quality," even as extended by the definition clause, the capability of the goods being lawfully resold according to the law of the country in which it is known that the resale is intended to take place. The terms, "quality," "state," and "condition," seem to me to refer to something essentially different in their nature from that. Reference was made to *Niblett* v. *Confectioners' Materials Co.* (1) and it was said that that case is an authority to support the plaintiffs' contention here, upon the ground that the question whether the condensed milk which was the subject of the action was of merchantable quality in this country depended upon the law of this country with respect to registered trade marks.

(1) [1921] 3 K. B. 387, 395.

But that was not the ground on which that case was decided. The three present members of this Court were members of the Court in that case. Of those three Scrutton L.J. did not rest his judgment on s. 14 at all; he dealt with the case under s. 12, sub-s. 1, alone. Atkin L.J. and I did both of us hold, as one of the grounds for our decision, that the sellers had committed a breach of the implied warranty under s. 14, sub-s. 2, that the milk should be of merchantable quality. But our decision in that respect was wholly independent of any question of the state of the law. What we were directing our attention to was the condition of the goods. I there said: "Quality includes the state or condition of the goods. The state of this condensed milk was that it was packed in tins bearing labels. The labels were as much part of the state or condition of the goods as the tins were." The packing of the milk was an essential part of its condition. There is nothing of that kind here. The "quality" of the tonic was perfectly good, its "state" was perfectly good, and so was its "condition." The only objection that could be taken to it was that one of its ingredients prevented it from being lawfully sold in the Argentine. On these grounds I am unable to come to the conclusion that the case falls within the sub-section at all. I have only one other observation to make and that is with reference to *Drummond* v. *Van Ingen*. (1) Mr. Schiller has insisted that the language of the Law Lords in that case supports his argument. But it seems to me that what was said there was said with reference to the facts of that case. What was there decided was that where goods are ordered of a particular description and to be of a quality equal to sample the fact that the goods supplied correspond in every respect with the sample is no excuse for their not answering the description even though the defect in the sample was latent and not discoverable on any reasonable inspection. What was sold there was "coatings," and the goods delivered were not coatings; owing to a certain defect in the cloth it was incapable of

(1) 12 App. Cas. 284.

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being used for that purpose. That decision was substantially an affirmation of what had previously been laid down in *Randall* v. *Newson* (1), to which Scrutton L.J. referred in the course of argument. There Brett J.A., as he then was, after citing a number of cases which dealt with the implied conditions of goods being reasonably fit for the purpose for which they are supplied or being of merchantable quality, says this: "In all, it seems to me, it is either assumed or expressly stated, that the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. . . . . If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable." But those cases have no real bearing on the point which we have to decide, for here the goods did answer the description in the contract. It was precisely the same composition that had for many years been sold under the name of Webb's Indian Tonic. In my opinion the appeal succeeds.

SCRUTTON L.J. The defendants sold f.o.b. in England to the plaintiffs a large quantity of "Webb's Indian Tonic" of which the defendants were the manufacturers, and which they knew was intended to be sent out to the Argentine where the plaintiffs carry on business. Unknown to the plaintiffs, the defendants' tonic contained a small proportion of salicylic acid, a fact which by reason of a certain law of the Argentine rendered it legally unsaleable in that country. The plaintiffs now contend that the impossibility of legally selling it in the market for which it was intended constitutes a breach of the implied condition that the goods should be of merchantable quality. In *Niblett* v. *Confectioners' Materials Co.* (2), which has been referred to, I agreed with my brothers' view under s. 12, sub-s. 1, that the sellers had broken the implied condition that they would have a right to sell the goods, but, as

(1) (1877) 2 Q. B. D. 102. (2) [1921] 3 K. B. 387, 398.

Bankes L.J. has pointed out, I did not discuss s. 14, sub-s. 2, further than to say this: "I have not been able to trace the origin or history of the condition that goods shall be of merchantable quality. If I had to express my present opinion it is that the condition does not touch the title to the goods or the right to sell them." I have looked a little further into the matter and can now finally express my opinion that "merchantable quality" does not cover legal title to goods or the legal right to sell. In my view "merchantable quality" means that the goods comply with the description in the contract, so that to a purchaser buying goods of that description the goods would be good tender. It does not mean that there shall in fact be persons ready to buy the goods. For instance take the case that I put during the argument; if you sell "vestings" of a particular fancy pattern for sale in China, you do not warrant that the Chinese buyer will like that pattern and will buy it when it goes out there; if the goods are vestings of the pattern contracted for, they are merchantable though nobody likes the pattern or is willing to buy. Similarly I do not think "merchantable quality" means that there can legally be buyers of that article. If the goods are of the contract description the possibility of legally making a sale of them does not in my view come within the expression "merchantable quality." I am still not quite clear when that expression first began to be used. I see that in *Randall* v. *Newson* (1) Lord Esher (or Brett J.A. as he then was) appears to have thought that it was first used in *Gardiner* v. *Gray*. (2) There was in that case a count "that the silk should be waste silk of a good and merchantable quality," and it was in reference to that count that Lord Ellenborough used the language which has repeatedly been quoted in other cases. "The intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill"; and that particularly picturesque passage

(1) 2 Q. B. D. 102, 109. (2) (1815) 4 Camp. 144, 145.

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has been cited by judge after judge in cases on this point ever since. Now when Lord Ellenborough there uses the word "saleable" I do not think he means "legally saleable." As explained by Lord Esher himself in *Randall* v. *Newson* (1), the fundamental thing is that "the article offered or delivered shall answer the description of it contained in the contract." And in a passage a little later on he adds: "If that subject matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable," or in other words shall be a good tender under a contract for a sale of goods of that description. I am quite unable to find that any case since has ever dealt with the possibility of legally selling the goods in the particular market and has treated that possibility as included in the definition of "merchantable." For these reasons I disagree with the view taken by Bailhache J.

ATKIN L.J. I agree with what has been said by the two other members of the Court that the mere fact that goods are unsaleable in the country in which they are intended to be sold because there is a law of that country prohibiting their sale does not constitute a breach of the implied condition that the goods shall be of merchantable quality. One has to remember when one is dealing with this subject that the matter is entirely independent of all questions as to whether the goods are fit for a particular purpose. The obligation to ensure that the goods shall be of merchantable quality is one which applies to all sales of goods by description quite irrespective of the place where they are intended to be resold. It is a warranty that the goods delivered shall be the goods described in the contract, and that they shall not differ from the normal quality of the described goods, including under the term "quality" their state or condition as required by the contract, to such an extent as to make them unsaleable.

(1) 2 Q. B. D. 102, 109.

Now in this particular case the goods delivered answered the description in the contract, and they were delivered in the state or condition that would ordinarily be required in the performance of a contract for the delivery of goods of this description f.o.b. It appears to me impossible to suggest that the seller under the warranty of merchantable quality warrants that the goods shall be capable of being sold in the particular place in which he knows that the buyer intends to resell them; in other words, warrants that there shall be no local legislation in that place prohibiting their sale. A case was put in argument which I think fairly illustrated what the contention of the sellers here amounts to. That contention must go the length of insisting that if a buyer resident in the United States, where there is a complete legislative prohibition against the sale of alcohol, were to order from another country goods containing alcohol to be imported into the United States, the seller must be taken to warrant that the goods are capable of being sold in the United States. That proposition need only be stated to show that it is impossible that the Sale of Goods Act can have implied a warranty which would have such an effect. To my mind the warranty extends no further than I have stated. Reference was made to *Niblett* v. *Confectioners' Materials Co.* (1), to the judgment in which I was a party, and I am quite clear that it was not my intention in that case to go in the least degree beyond what I have said in the present. There the contract was to deliver a number of cases of condensed milk, and in performance of that contract there were delivered in this country a number of cases containing tins bearing labels which were an integral part of what was delivered. Those labels were of such a misleading character as to expose any buyer of the tins to an action for infringement of trade mark, and indeed the sellers had been threatened with an injunction. The result was that nobody would buy those tins, because, if they did, they would probably be buying a law suit, and the tins in that state and condition were unsaleable, not merely in this country by reason of a law peculiar to this country,

(1) [1921] 3 K. B. 387.

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but unsaleable anywhere, and unsaleable in precisely the same sense that they would have been unsaleable if they had been blown, or indented, or if they had indicated that they would be in other respects worthless to the buyer. It seems to me that the decision in that case is entirely in conformity with the decision which we are giving now. For these reasons I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for the defendants: *W. H. Martin & Co.*
Solicitors for the plaintiffs: *Romer & Skan.*

J. F. C.

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Nov. 1.

BOOTH *v.* BOOTH.

Revenue—Income Tax—Deduction—Separation Deed—Covenant—"Such weekly sum as will after deduction of income tax amount to 260l. per annum"—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 5)—*Rules applicable to All Schedules, r.* 23.

A husband and wife entered into an agreement of separation by which the husband covenanted to pay to the wife "such weekly sum as will after deduction of income tax amount to 260*l.* per annum." The husband in making payments to his wife under the agreement deducted income tax. The wife claimed to recover arrears of weekly instalments due under the agreement, and also a declaration that the husband was bound to pay the clear weekly sum of 5*l.* without any deduction in respect of income tax:—

Held, that the covenant was a contract by the husband to pay his wife such a gross sum as would, after deduction of income tax on that sum, leave the wife a nett sum of 260*l.* per annum; that it did not contravene the provisions of the Income Tax Acts; and therefore that the husband was not entitled to deduct income tax from the weekly payments.

APPEAL from Oldham County Court.

On February 12, 1920, the plaintiff, Isabella Ann Booth, and the defendant, Ernest Booth, entered into an agreement of separation which contained the following recital: "Whereas unhappy differences have arisen between the husband and wife by reason whereof they have mutually agreed to live

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apart from each other and the husband has agreed to pay or cause to be paid to the wife such weekly sum as will after deduction of income tax amount to 260*l.* per annum " from August 25, 1919. The husband by para. 1 (*c*) covenanted to " pay or cause to be paid to the wife or such person or persons as she shall from time to time direct or appoint in writing such weekly sum as aforesaid."

The husband in making payments to his wife under the above-mentioned agreement deducted income tax.

The wife thereupon commenced these proceedings by which she claimed to recover from her husband 28*l.* as arrears of weekly instalments due under the above-mentioned covenant, and also claimed a declaration that under the indenture she was entitled to receive and that the defendant was bound to pay the clearly weekly sum of 5*l.* without any deduction in respect of income tax or otherwise.

The county court judge held that the decision in *Blount* v. *Blount* (1) governed the case, and that the covenant was void under r. 23 of the rules applicable to all Schedules of the Income Tax Act, 1918 (2), and he accordingly gave judgment for the husband.

The wife appealed.

Wilfred Cotton for the wife. The covenant in the indenture is not a contract to pay a sum free of income tax, but is a contract to pay an indefinite larger sum which will after deduction of income tax amount to 260*l.* per annum. It therefore does not contravene the provisions of r. 23 of the general rules applicable to all Schedules of the Income Tax Act, 1918. In *Blount* v. *Blount* (1) the covenant was to pay 62*l.* 10*s.* per quarter free of income tax. This was held to be void under s. 103 of the Income Tax Act, 1842, which is similar to r. 23 of the Act of 1918. But Scrutton J. expressed

(1) [1916] 1 K. B. 230.

(2) Income Tax Act, 1918, general rules applicable to all Schedules, r. 23: "(1.) A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of fifty pounds."

"(2.) Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void."

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the view (1) that if the covenant had been a contract to pay an entirely different sum which after deducting income tax would leave 62*l.* 10*s.* it would have been a valid covenant. In *In re Saillard* (2) a bequest of an annuity of 200*l.* per annum free of all duties was held to be subject to income tax, but Swinfen Eady L.J. pointed out that the bequest might have been framed in such a way that the annuitant might receive the annuity free of income tax without infringing the Income Tax Acts. In the present case the language used is such as to carry out the intention of the parties that the wife should receive the weekly sum of 5*l.* free of income tax. The decision of the House of Lords in *Brooke* v. *Price* (3) is an authority in favour of the wife's contention. In *In re Peck's Settlement* (4) there was a settlement to pay an annuity of 175*l.* clear of income tax and a further covenant by the settlor to make up any deficiency in the annuity, and Eve J. held, following *Blount* v. *Blount* (5), that both the settlement and the covenant were void and unenforceable under the Income Tax Acts. But the language of the settlement and covenant in that case was very different from that used in the separation agreement in the present case. Eve J. moreover pointed out that the arrangement was one which might have been carried out in a legal manner.

Morle for the husband. The covenant in this separation agreement is void as contravening r. 23 of the rules applicable to all Schedules of the Income Tax Act, 1918, because it is a covenant by the husband to pay to his wife 260*l.* per annum plus income tax on the 260*l.* That is forbidden by the statute. If the parties desired that the wife should have a clear income of 260*l.* per annum it must be done in a proper way. The husband ought to have covenanted to pay to his wife 371*l.* per annum, because that sum after deduction of income tax would leave 260*l.* per annum. Scrutton J. was referring to a covenant so framed in *Blount* v. *Blount* (5), but such a covenant is very different from the covenant in the present case.

(1) [1916] 1 K. B. 235. (2) [1917] 2 Ch. 401. (3) [1917] A. C. 115.
(4) [1921] 2 Ch. 237. (5) [1916] 1 K. B. 230.

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HORRIDGE J. This is a claim by a wife against her husband to recover instalments due to her under an indenture dated February 12, 1920. By that indenture the husband agreed to make the payments to his wife referred to in the recital, which was in the following terms: "The husband has agreed to pay or cause to be paid to the wife such weekly sum as will after deduction of income tax amount to 260*l.* per annum." Rule 23 of the rules applicable to all Schedules of the Income Tax Act, 1918, provides that "every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void." That rule re-enacts s. 103 of the Income Tax Act, 1842. The case of *Blount* v. *Blount* (1) decided that under s. 103 a mere agreement to pay a quarterly sum of 62*l.* 10*s.* "free of income tax" was void. In giving judgment Scrutton J. said (2): "It is really a covenant to pay 62*l.* 10*s.* plus such sum, representing the income tax, as, when deducted from the principal sum, would leave a clear 62*l.* 10*s.* for the particular quarter, and it is said that I ought to try and construe the covenant so as to make it legally possible. I am disposed, particularly in view of what I am going to say at a later stage, to give to the covenant, if possible, such a meaning as would give effect to the intention of the parties, but I find very great difficulty in saying that a contract to pay 62*l.* 10*s.* free of income tax means a contract to pay an entirely different sum which, after deducting the income tax, will leave 62*l.* 10*s.*" The decision of the House of Lords in *Brooke* v. *Price* (3) does not seem to me to have any bearing on what we are dealing with here, because the basis of that decision was that the annual sum to be paid was a proportion of a larger sum, which larger sum had already paid income tax, and therefore it was a proportion of the nett sum after payment of income tax. The question in the present case really is whether the agreement is to pay such a sum of money as after deducting income tax on that sum will leave 260*l.* in which case it will be within the case

(1) [1916] 1 K. B. 230. (2) [1916] 1 K. B. 235.
(3) [1917] A. C. 115.

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suggested by Scrutton J. in *Blount* v. *Blount* (1) and in my opinion will be good. On the other hand if it is an agreement to pay 260*l.* per annum and to pay the income tax on 260*l.* it will be bad. I think that the covenant means what it says—namely, that it is an agreement by the husband to pay to the wife such weekly sum as will, after deduction of income tax, amount to 260*l.*, that is to say, to pay her such a gross sum as will after the deduction of income tax on that gross sum leave a nett sum of 260*l.* per annum. I think that is the true construction of the covenant and this appeal therefore succeeds.

SHEARMAN J. I am of the same opinion. The county court judge felt himself constrained by the decision of Scrutton J. in *Blount* v. *Blount* (1) to hold that he could not effectuate the real intention of the parties. There is no question as to what the real intention of the parties was, and any Court must desire to effectuate an honest intention unless prevented by the law from so doing. In *Blount* v. *Blount* (1) Scrutton J. felt himself bound by previous decisions and by the clear language of s. 103 of the Income Tax Act, 1842, which was then in force, to find that the agreement there was void. Sect. 103 of the Act of 1842 is now contained in r. 23 of the rules relating to all Schedules under the Act of 1918. We should be obliged to follow that decision if that case were on all fours with the present one. I approach that case with a strong desire not to carry it any further, more especially as it is quite clear from Scrutton J.'s judgment that he desired if he could to accede to the argument on behalf of the wife. He said that he found very great difficulty in saying that a contract to pay 62*l.* 10*s.* free of income tax meant a contract to pay an entirely different sum which, after deducting the income tax, would leave 62*l.* 10*s.* To my mind he clearly indicated a covenant framed in the very words which appear in this particular covenant. We should be obliged by the terms of the statute to declare the covenant void if it were a covenant to pay income tax on the

(1) [1916] 1 K. B. 230.

specific sum covenanted to be paid. But here it is quite clear that the framer of this covenant meant nothing more than the settlor actually said—namely, that he would see that a certain gross sum was paid and whatever that gross sum was he would see that his wife received the nett sum of 260*l.* That does not fall within the prohibitive provisions of the Act. I do not think that the case in the House of Lords of *Brooke* v. *Price* (1) is of any assistance in this case. That was merely a case of the payment by trustees of a proportion of a larger sum on which income tax had already been paid and therefore does not affect the point before us. We have also been referred to *In re Peck's Settlement.* (2) In that case Eve J. pointed out that the arrangement was one which might have been carried out in a legal manner. In my opinion the words in the covenant in the present case do not contravene the provisions of the statute. The county court judge was wrong in not distinguishing this case from *Blount* v. *Blount* (3) and therefore this appeal must be allowed.

Appeal allowed.

Solicitor for wife: *W. B. Glasier, for Arthur P. Brooks, Stockport.*

Solicitors for husband: *Church, Adams & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

(1) [1917] A. C. 115. (2) [1921] 2 Ch. 237.
(3) [1916] 1 K. B. 230.

R. F. S.

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July 22, 27.

[IN THE COURT OF APPEAL.]

THE KING *v.* THE COUNCIL OF THE METROPOLITAN BOROUGH OF POPLAR. [No. 1.]

Ex parte THE LONDON COUNTY COUNCIL.

SAME *v.* SAME. [No. 1.]

Ex parte THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT.

Rate—Metropolis—County Rate—Contributions to Metropolitan Asylum District—Non-payment by Borough Council as Overseers—Remedy by Distress—Mandamus—Poor Rate Act, 1839 (2 *&* 3 *Vict. c.* 84), *s.* 1—*County Rates Act*, 1852 (15 *&* 16 *Vict. c.* 81), *s.* 28—*Metropolitan Poor Act*, 1867 (30 *&* 31 *Vict. c.* 6), *s.* 58—*London Government Act*, 1899 (62 *&* 63 *Vict. c.* 14), *s.* 11.

By s. 11, sub-s. 1, of the London Government Act, 1899, the council of each metropolitan borough were made the overseers of every parish within the borough. The London County Council, under the County Rates Act, 1852, and s. 11, sub-s. 2, of the London Government Act, 1899, issued a precept to the Poplar Borough Council, one of the metropolitan boroughs, requiring them to pay a certain sum as their proportion of the county rate. The Managers of the Metropolitan Asylum District also issued a precept to the guardians of the parish of Poplar under s. 56 of the Metropolitan Poor Act, 1867, requiring payment of a certain sum, and the guardians accordingly served an order for contribution on the borough council as the overseers. The borough council refused to pay the sums, and upon an application for a writ of mandamus in each case commanding the borough council to pay the sum and if necessary to make and levy a rate for the purpose, the borough council contended (1.) that there was in each case a statutory remedy for breach of the statutory duty, namely, by distress, and that was the only remedy, and that therefore the Court could not grant a mandamus; and (2.) that if the Court had a discretion, inasmuch as there was another equally convenient and effectual remedy, namely, by distress, the Court in the exercise of its discretion would refuse to grant a mandamus:—

Held, as regards the precept of the London County Council, that the London Government Act, 1899, did not provide any remedy for breach of the duty imposed upon the borough council by that Act, and that therefore the Court could grant a mandamus; and as regards the precepts both of the London County Council and of the Managers of the Metropolitan Asylum District, that the remedy by distress (assuming it to be applicable to the London County Council rate) was wholly inadequate, and that mandamus was the only effective means of securing the performance of the public duty.

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REX v. POPLAR BOROUGH COUNCIL. (No. 1.)

APPEALS from two orders of the Divisional Court making absolute two rules for peremptory writs of mandamus, the first commanding the Council of the metropolitan borough of Poplar to pay to the London County Council the sum of 33,944*l.* 10*s.* 6*d.*, the first instalment due under a precept of the said London County Council dated May 10, 1921, and if necessary to make and levy a rate for that purpose; the second commanding the same borough council to pay to the Managers of the Metropolitan Asylum District two sums of 7035*l.* each due from them under and by virtue of a precept of the said managers to the guardians of the poor of the parish of Poplar dated April 9, 1921, and if necessary to make and levy a rate for the purpose of that payment.

In the first case the affidavit filed in support of the rule stated that by s. 3, sub-s. 1, of the Local Government Act, 1888, the powers formerly possessed by justices under the County Rates Acts, 1852 and 1866, with regard to making, assessing, and levying county rates were transferred to county councils. By s. 11, sub-s. 1, of the London Government Act, 1899, the council of each borough created by that Act were made overseers of every parish within the borough, and by sub-s. 2 "Every precept issued by any authority in London for the purpose of obtaining money which is ultimately to be raised out of a rate within a borough, other than a precept sent to guardians by the Local Government Board or by a body containing representatives elected by the guardians, shall be sent to" the borough council, "and shall be executed by them." The Metropolitan Borough of Poplar was one of the boroughs created by that Act.

The precept of the London County Council, which was dated May 10, 1921, required the council of the borough of Poplar to pay to the treasurer of the county of London the sum of 135,778*l.* 1*s.* 6*d.* in four instalments, the first being payable on or before May 28, 1921, and the other three on or before June 28, July 28, and August 28, respectively, being the borough of Poplar's contribution to a county rate made on the above-named date by the London County Council. On March 22, 1921, the Poplar Borough Council passed the

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following resolution: "That the precepts for the London County Council, the Metropolitan Police, the Metropolitan Water Board, and the Metropolitan Asylum Board be deleted, and that the estimates as amended be referred to the valuation and rating committee to ascertain the rate in the £ necessary to be levied." On March 26 the town clerk of Poplar informed the London County Council of the passing of this resolution. The first instalment of 33,944*l.* 10*s.* 6*d.*, due on May 28, not having been paid, the rule nisi for a writ of mandamus was obtained at the instance of the London County Council.

In an affidavit in opposition to the rule, made by the mayor of the borough of Poplar and three other members of the borough council, it was stated (in substance) that the borough council controlled a district which was inhabited by people of very limited financial resources with a large and increasing number of unemployed or unemployable, the number of unemployed for the week ending June 3, 1921, being 15,574 out of a total population of about 160,000; that there was a large increase in the borough council's liability with regard to the poor mentally deficient; that the borough had a very low rateable value—namely, 947,996*l.* as against that of the City of Westminster of over 7,000,000*l.*—and if the council were to levy a rate for the full charges for the current year, the total rate estimated on the basis of the June quarter would be 1*l.* 18*s.* 8*d.* in the £, and that the London County Council rate could not possibly be satisfied; that it would be inopportune and useless to levy the rate, and that in the financial circumstances the borough council was unable to discharge its liabilities. The affidavit further submitted (so far as material) that the only possible manner in which the precept could be satisfied was by pursuing the statutory remedies where the borough council were unable to satisfy the precept—namely, under ss. 26–28 of the County Rates Act, 1852, on failure of the guardians to pay the precepts issued to them the justices might issue warrants to the overseers, and if the overseers made default or neglected to pay the sums specified in the warrants the treasurer of the county

might make complaint to a justice of the peace, who might, by warrant under his hand, levy the sums by distress and sale of the goods of the offender, the Poplar Borough Council; that by s. 11, sub-s. 1, of the London Government Act, 1899, the borough council were made overseers of the parishes within the borough, and by sub-s. 2 the precept was directed immediately to the overseers; and that therefore there was an ample remedy by statute which the London County Council had not pursued; and that in view of the foregoing facts and particularly of the fact that there was available an alternative statutory remedy the Court should not make the rule absolute.

With regard to the second rule, the affidavit in support thereof stated that by the Metropolitan Poor Act, 1867, the Managers of the Metropolitan Asylum District were constituted, and all expenses incurred by the managers in providing asylums for sick, insane or infirm or other classes of the poor chargeable in unions or parishes were to be defrayed by contributions from the unions and parishes forming the district or by the respective unions or parishes from which the inmates of the asylums were sent. By ss. 55–58 the sums to be contributed were to be settled in proportion to the annual rateable value of the property in the unions and parishes, and the managers were from time to time to require the guardians to pay the amounts of their contributions; and if the contribution was not paid the managers were to have the like remedy for recovery thereof from the overseers as guardians had for recovery from overseers of contributions of parishes. For the half-year ending September 30, 1921, the contribution due from the borough of Poplar was 28,143*l.* 12*s.*, and a precept, dated April 9, 1921, was duly sent to the guardians requiring them to pay the amount in four instalments, the first two being for 7035*l.* each payable on or before May 1 and June 1, 1921. The guardians issued their precept to the Poplar Borough Council as the overseers, including in it the two sums of 7035*l.*, neither of which was paid.

The affidavit in opposition to the rule, made by the same

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four members of the borough council, set out the financial circumstances of the borough as hereinbefore stated, and alleged that the failure and inability of the borough council as overseers to satisfy the precept had been provided for by the Legislature by the Poor Rates Act, 1839, s. 1, as amended by s. 58 of the Metropolitan Poor Act, 1867—namely, by complaint to justices, who might, by warrant, levy the amount from the overseers; that no such application had been made to justices, nor had the justices been asked to levy nor had they levied the required sums of money by distress and sale of the goods of the borough council or in any other way; and that in view of the facts and particularly of the fact that there was available an alternative statutory remedy the Courts should not make the rule absolute.

The Court (Lawrence C.J., Sankey and Branson JJ.) made both rules absolute.

The judgment of the Court was on July 7 read by Sankey J.: Upon May 10, 1921, the London County Council, under the County Rates Act, 1852, the Local Government Act, 1888, and the London Government Act, 1899, duly addressed a precept to the Council of the Metropolitan Borough of Poplar, which is within the council's administrative area, requiring payment of the sum of 135,778*l.* 1*s.* 6*d.* by four instalments on the 28th of May, June, July, and August, 1921. The borough council refused to pay the first instalment of 33,944*l.* 10*s.* 6*d.*, or to make and levy a rate for that purpose upon the ratepayers in their area. They were of opinion, as appears from the affidavit which they filed in the present proceedings, that it would be inopportune and useless further to levy their ratepayers, and they state their reasons in paras. 13, 14, and 15, where they refer to the limited financial resources of the borough, the increasing amount of unemployment, the poverty of many of the ratepayers, and their position when contrasted with that of wealthier neighbours. We cannot help expressing our sympathy with the inhabitants of Poplar in the misfortune in which they find themselves, but it is possible to believe and regret that there are many other contributing districts suffering under similar conditions.

Upon this refusal the county council obtained an order directed to the borough council to show cause why a writ of mandamus should not issue directed to them commanding them to pay to the county council the instalment of 33,944*l.* 10*s.* 6*d.*, and if necessary to make and levy a rate for that purpose, on the ground that the said sum had become due and was unpaid and that the borough council had failed and refused to pay the sum and to exercise their statutory powers to provide for such payment.

When the case came on for hearing the learned counsel for the borough said that he only desired to argue one point—namely, that, as the county council had an alternative remedy, this Court in the exercise of its discretion ought to refuse to grant a mandamus. The alternative remedy referred to is that contained in the County Rates Act, 1852, which in ss. 26 and 27 provides for the machinery by which the county rate is to be collected, and in s. 28 provides the remedy for refusal or neglect to do so. That section reads: "If any overseer, petty constable, peace officer, or other person as aforesaid refuse, make default, or neglect to pay to the treasurer of the county or place within the time limited as aforesaid, the sum or sums of money specified in the said warrants, and if the clerk of the peace or treasurer of the county or place make complaint thereof, then any justice of the peace of such county or place may by warrant under his hand levy the same by distress and sale of the goods of the offender. . . . ." The overseers have been succeeded by the borough council, who now stand in their place. The learned counsel relying on this section pointed out that the county council are entitled, if the borough council make default, to go before a justice of the peace and get a warrant to levy the sum of money due by distress and sale of the goods of the borough council. He contended that, as there is this alternative remedy by distress on the goods of the borough council, this Court ought not to issue a mandamus.

The writ of mandamus is of very ancient origin. It cannot be demanded as of right, and issues only in the discretion

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of the Court. As Lord Chelmsford says in *Reg.* v. *All Saints, Wigan* (1), "The Court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter, personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned." The writ has often been granted against public authorities, as for example in the case of *Reg.* v. *Leicester Union* (2), where this Court decided that the duty imposed upon guardians by s. 5 of the Vaccination Act, 1871, to appoint a vaccination officer may be enforced by a writ of mandamus upon the application of the Local Government Board. A number of cases referred to in the Practice of the Crown Office, Short and Mellor, 2nd ed., p. 210, shows that the mere fact that another remedy does exist is not sufficient of itself to induce the Court to refuse to act, but if the alternative remedy is equally appropriate, beneficial, and convenient, the Court will not issue its mandamus. The problem that we have to decide in the present case is whether the alternative remedy referred to by the borough—that is, the remedy by distress—comes within this rule. Is the remedy equally appropriate, beneficial, and convenient? The learned counsel for the borough suggested that it was, and when asked on what goods a distress could be levied, answered that the borough had an electrical generating station, children's playing grounds and so forth. We do not think that these are goods upon which a distress could be levied within the meaning of s. 28 above mentioned. The affidavit filed by the borough council was singularly silent as to what goods the respondents possessed upon which levy could be made. It may be that they possess at their council chamber tables, chairs and other such accessories, and at other places horses, water carts and dust carts and other such property required for carrying out the duties of local government in their area. We do not think that it would be appropriate to levy a distress and proceed to a forced sale of such articles. The result would be to cause great inconvenience to the councillors, officials and others charged with the duty of local administration, and

(1) (1876) 1 App. Cas. 611, 620. (2) [1899] 2 Q. B. 632.

seriously to interfere with the machinery for carrying out necessary public services, possibly to the prejudice of the health and well being of the inhabitants. If goods of the character above referred to were sold under a distress it is obvious that they would have to be bought back or replaced by the council. In our view it would be neither appropriate, beneficial nor convenient to sell on one day goods which the borough council would have to replace immediately possibly, very probably, at an enhanced price, with the result that in the interval the most necessary items of local government could not be carried on at all, or only carried on with the greatest difficulty. We venture to think that the borough councillors could not successfully urge, and possibly on reflection would not desire to contend in the present circumstances, that it would be more appropriate and convenient to allow a distress to issue whereby they would be prevented from having the means of conveniently carrying out their important public duties, and the necessary public services would be diminished or discharged with difficulty rather than that a rate should in the usual and ordinary way be made and duly levied on all classes of the population. Again, can it be suggested that it would be more convenient to sell up all the goods belonging to the Poplar Council once a month for four months rather than to issue a mandamus to them to perform their duty in the usual and ordinary way ? We think not.

Reliance was placed by the borough council upon the decision of this Court in *Rex* v. *Bermondsey Borough Council* (1) where the Court refused in its discretion to issue a writ of mandamus, and we were asked to follow that decision. It is undoubtedly true that judicial discretion must be exercised according to reasonable and stable principles, and if the facts in the *Bermondsey Case* (1) were indistinguishable from those in the present case, we should not only desire, but it would be our duty to follow it. When examined, however, that case will be found as far removed from the present one as the poles are asunder. In the *Bermondsey Case* (1), first, it was sought on behalf of the guardians to

(1) (1908) 72 J. P. 330.

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compel by mandamus the immediate raising of a balance of a capital sum of 65,000*l.*, which would usually be raised, and which the borough were of opinion ought under the circumstances then existing to be raised, by annual sums over a period of years. Secondly, there was a dispute as to the liability for the sum of 20,000*l.* which the Court held could be more conveniently decided if the alternative remedy were adopted. No such circumstances exist in the case under discussion. We are not unmindful of the fact that the argument that it is not appropriate or convenient to pursue an alternative remedy of distress on the borough council's goods was also available in the *Bermondsey Case* (1), but it was not apparently so much pressed upon the Court in that case as it was upon us. We are far from saying that we should always issue a mandamus in preference to allowing the parties to pursue such an alternative remedy, but we are of opinion that there must be strong reasons which were present in the *Bermondsey Case* (1), and are absent in that now under discussion, to induce the Court to refuse mandamus and leave the parties to an alternative remedy of such a character. We cannot forget that there is a great difference between levying a distress upon the goods of a public body, such as the borough council, and levying a distress upon the goods of an individual, which was the original remedy provided by s. 28 of the County Rates Act. Beyond that it was pointed out in the *Bermondsey Case* (1) how inconvenient it would be to try the disputed issue on the return to a writ of mandamus. No such dispute exists in the present case. In the result we are of opinion that the rule in this case should be made absolute.

The second rule was granted ordering the borough council to show cause why a writ of mandamus should not issue directed to them commanding them to pay to the Managers of the Metropolitan Asylum District two sums of 7035*l.* each, due from them under and by virtue of a precept of the said managers to the guardians of the poor of the parish of Poplar dated April 9, 1921, and if necessary to make and levy a rate for the purpose of that payment. There is no difference

(1) 72 J. P. 330.

in principle between the two cases. The machinery by which the asylum rate is collected is a little different from that by which the county rate is collected, and the alternative remedy upon which the learned counsel for the Borough Council of Poplar relies is that contained in s. 1 of the Poor Rate Act, 1839, being the same as in the *Bermondsey Case.* (1) It will be observed that this section does not actually contain the word " goods " as s. 28 of the County Rates Act does, but in our view that makes no difference; for although the section does not contain that word, it gives a right of distress which would apply to goods and chattels; and the observations which we have already made in the previous case apply to the present one. We are therefore of opinion that this rule must be made absolute.

The Poplar Borough Council appealed in both cases.

Slesser for the appellants. The duty of the Poplar Borough Council (who by s. 11, sub-s. 1, of the London Government Act, 1899, are made overseers of every parish within their borough) to pay the precepts of the London County Council is imposed by statute—s. 11, sub-s. 2, of the London Government Act, 1899—and the remedy provided by statute is the only remedy available: *Pasmore* v. *Oswaldtwistle Urban Council* (2), per Lord Halsbury and Lord Macnaghten, quoting Lord Tenterden in *Doe* v. *Bridges.* (3) It is not a matter of discretion; the remedy provided is the only remedy: *Peebles* v. *Oswaldtwistle Urban Council* (4); *Robinson* v. *Workington Corporation.* (5) If the overseers fail to pay, the statutory remedy provided is by " distress and sale of the goods of the offender ": County Rates Act, 1852, s. 28.

As to the precept of the Managers of the Metropolitan Asylum District, that body comes within the exception in s. 11, sub-s. 2, of the London Government Act, 1899, and therefore does not come within the provisions of that section. They were constituted by the Metropolitan Poor Act, 1867,

(1) 72 J. P. 330.
(2) [1898] A. C. 387, 394, 397.
(3) (1831) 1 B. & Ad. 847, 859.
(4) [1897] 1 Q. B. 625, 627.
(5) [1897] 1 Q. B. 619.

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ss. 55–57 of which deal with the contributions of unions and parishes, and s. 58 provides the remedy for failure to pay the contribution. The remedy is "the like remedy for recovery of the contribution . . . . from the overseers or other officers authorized to levy poor rates in the several parishes . . . . as guardians have for the time being for recovery from overseers of contributions of parishes." The statutory remedy in the case of guardians against overseers is that given by s. 1 of the Poor Rate Act, 1839—namely, in the same manner as moneys assessed for the relief of the poor, that is, by distress.

Secondly, if the appellants are wrong upon the first point, then the Court in its discretion will not grant the mandamus, as there is another remedy equally convenient, beneficial, and effectual—namely, distress: *Rex* v. *Bermondsey Borough Council.* (1) *Reg.* v. *Leicester Union* (2) is distinguishable, because the only effectual remedy for the refusal of the guardians to appoint a vaccination officer is by mandamus.

Macmorran K.C. and *E. H. Tindal Atkinson* for the London County Council; *Macmorran K.C.* and *C. Herbert Smith* for the Managers of the Metropolitan Asylum District. Sect. 28 of the County Rates Act, 1852, was directed to default by individual overseers. Sect. 11 of the London Government Act, 1899, applies to the borough council as overseers, and the Act, though it imposes a new duty on the borough council, does not provide any remedy for failure to perform the duty. There is therefore no exclusive remedy provided by the Act. For failure to perform the new duty created by the Act of 1899 the remedy by distress on the goods of the borough council is not applicable. The borough council is not for this purpose in the same position as individual overseers. Under s. 26 of the County Rates Act, 1852, the precept was issued to the guardians requiring them to pay the sum mentioned therein, and on their default the justices might, by s. 27, issue warrants to the overseers of the parishes to collect and pay the sum. By s. 11 of the London Government Act, 1899, unless the case comes within the exception, the precept is sent direct to the overseers—namely, the borough council.

(1) 72 J. P. 330. (2) [1899] 2 Q. B. 632.

The duty therefore is a new duty for which no remedy is provided, and the remedy by distress is not applicable. Moreover, as Lord Macnaghten said in *Pasmore* v. *Oswaldtwistle Urban Council* (1), there are exceptions to the general rule, and " whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience."

With regard to the precept of the Managers of the Metropolitan Asylum District—and this argument applies also to the precept of the London County Council, if the remedy by distress is applicable—the remedy by distress is quite an inadequate remedy for so large a sum ; the only effectual remedy against this public body for breach of a public duty is by mandamus. Distress would be quite an inadequate remedy against individual overseers ; it is even more inconvenient and inadequate as against a borough council. In *Rex* v. *Bermondsey Borough Council* (2) the facts were very special, and the case, if correctly decided, is distinguishable on that ground.

[*Rex* v. *Christ's Hospital* (3) was also referred to.]

Slesser in reply.

BANKES L.J. We are all of opinion that the appeals should be dismissed, but we will state our reasons in writing.

Cur. adv. vult.

July 27. The following judgments were read :—

BANKES L.J. The Poplar Borough Council appeal against two orders of the Divisional Court directing two peremptory writs of mandamus to issue, the one commanding the borough council to pay to the London County Council the sum of 33,944*l.* 10*s.* 6*d.*, the first instalment due under a precept of the said London County Council dated May 10, 1921, and the other to pay to the Managers of the Metropolitan Asylum

(1) [1898] A. C. 397. (2) 72 J. P. 330.
(3) [1917] 1 K. B. 19.

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District two sums of 7035*l.* each due from them under and by virtue of a precept of the said managers to the guardians of the poor of the parish of Poplar dated April 9, 1921, and in each case if necessary to make and levy a rate for the purpose of those payments. The orders were made by the Divisional Court in consequence of a refusal by the borough council to honour the precept, or to attempt to raise or pay any portion of the money required. The borough council made no objection to the validity of the precepts, and did not dispute their statutory obligation to raise the moneys, but in an affidavit sworn by the mayor and some other members of the borough council complaint is made that the borough of Poplar is in an unfortunate position as compared with other metropolitan boroughs, and the deponents submit that in the financial circumstances in which the council finds itself the council is unable to discharge its liabilities, and that it ought not to be called upon to undertake further liabilities which it cannot possibly meet. I call attention to this submission merely for the purpose of pointing out that upon an application, such as the present, these are matters with which a court of law has no concern. Parliament has laid the statutory duty upon the Poplar Borough Council of obeying the precepts and paying the money. They refuse to do so. The only concern of the Court under these circumstances is to interpret the will of Parliament and to see that the appropriate remedy is applied. If the existing law presses too hardly upon the borough of Poplar, it is Parliament alone who can reduce the pressure. If those who control the expenditure of the borough lay a greater burden upon the ratepayers than they can bear the ratepayers have the remedy in their own hands.

That prima facie mandamus is the appropriate remedy where there is a clear breach of duty by a public body, the performance of which would be to the benefit of the person or body complaining, is clear. In cases where the statute creating the duty has prescribed a form of remedy for a breach of that duty other than mandamus, then as a general rule the Court will not allow any other remedy to be pursued.

There may also be cases where the party complaining may have some alternative remedy as convenient, beneficial and effectual as mandamus, and if so in its discretion the Court will not grant a writ of mandamus. In the Divisional Court the contention for the borough council proceeded apparently upon the assumption that the county council and the managers each had an alternative remedy and that the Court ought, in the exercise of its discretion, to refuse to grant a mandamus. If the argument had been confined to this point in this Court I should not have considered it necessary to add anything to what was said by Sankey J. in his judgment, as I entirely agree with the grounds of his decision. In this Court, however, the argument was put a great deal higher. It was contended that an exclusive remedy was provided by statute for both of the breaches of duty complained of, and that the Court had no power to make an order granting the writs. The rule which has guided the Courts in reference to this last contention is to be found in many cases. I will only refer to three. In *Rex* v. *Archbishop of Canterbury* (1) Lord Ellenborough points out: "There have been many dicta of judges cited, from none of which am I prepared to differ, or to deny to any of them their proper weight and authority; the result of them is in effect this, that this Court, in the exercise of its authority to grant the writ of mandamus, will render it as far as it can the suppletary means of substantial justice in every case where there is no other specific legal remedy for a legal right; and will provide as effectually as it can that others exercise their duty wherever the subject-matter is properly within its control. The right of the Court to apply these means for the attainment of such an end, and to prevent that defect of legal justice which might otherwise ensue, has been in general admitted." In *Doe* v. *Bridges* (2) Lord Tenterden says: "Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is

(1) (1812) 15 East, 117, 136.

(2) 1 B. & Ad. 847, 859.

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ordained, the common law may, in general, find a mode suited to the particular nature of the case." And in *Pasmore* v. *Oswaldtwistle Urban Council* (1) Lord Halsbury says that he decided the case upon the ground that the statute provided the only remedy for a new obligation created by the statute itself.

In my opinion, the argument in the case of the London County Council fails on the face of the statute which creates the obligation. The material section is s. 11, sub-s. 2, of the London Government Act, 1899, which is in these terms: "After the appointed day every precept issued by any authority in London for the purpose of obtaining money which is ultimately to be raised out of a rate within a borough, other than a precept sent to guardians by the Local Government Board or by a body containing representatives elected by the guardians, shall be sent to the council at their office, addressed to the council or to the town clerk. Any such precept, if so sent and addressed, shall be deemed to be personally served on the council, and shall be executed by them. 'Precept' in this section includes any order, certificate, warrant, or other document of a like character, and the Local Government Board may settle the form of any precept as so defined." This statute, though it creates the obligation for the first time, is entirely silent on the question of any remedy as against the council. The fact that the council are overseers of every parish within the borough under s. 11, sub-s. 1, of the statute, and may be proceeded against as such for breaches of duty created by other statutes, appears to me to be quite irrelevant.

The case of the Managers of the Metropolitan Asylum District stands in a somewhat different position. The precept issued by that body is excepted from s. 11, sub-s. 2, of the London Government Act, 1899. The Metropolitan Poor Act, 1867, is the Act which provides for the contributions of unions and parishes to the requirements of the managers. Sect. 56 authorizes the managers to call upon the guardians for such contributions as the managers consider requisite for

(1) [1898] A. C. 387, 397.

their purposes. It was under this section that the managers served the guardians with the formal precept dated April 9, 1921. The guardians, in their turn, acting under their general powers, caused an order for contribution to be served upon the council of the borough of Poplar as the overseers of the parishes within the borough, requiring them to pay to the treasurer of the guardians on certain named dates during the periods ending June 30, 1921, and September 30, 1921, respectively, and out of the general rate, sums amounting altogether to over 253,000*l.*, which sums included the amount specified in the managers' precept to the guardians. The borough council refuse to include this last amount in their estimates, or to levy any rate which will include it. This is the default complained of by the managers, and in respect of which they apply for a mandamus. The Metropolitan Poor Act, 1867, s. 58, provides machinery by which the managers may, if the guardians make default in paying the contribution demanded of them, proceed against the overseers in like manner as the guardians may proceed against them for recovery of contributions of parishes. In the present case the managers are not complaining of any default on the part of the guardians. The contribution, it is true, has not been paid, but that is not through any actual default of the guardians. The obligation to pay is laid by the statute upon the guardians. If the managers had sought to obtain a mandamus against the guardians, it might have been open to them to contend that the statute pointed out the appropriate remedy for the managers to take by proceedings against the overseers direct. Whether such a contention would avail them I will consider later, but I cannot see that the overseers can successfully claim to stand in the shoes of the guardians for the purpose of taking any advantage of the provision in the statute. The statutory obligation upon the borough council to obey the precept of the guardians is not contained in the Metropolitan Poor Act at all. What remedy the guardians may have against the overseers for failing to comply with the precept seems to me for the present purpose to be immaterial. There is no statute which, in my opinion,

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provides the managers with an exclusive remedy for the breach of duty of which they complain.

Assuming for the purpose of the argument that the borough council can take the point that for the present purpose they can claim the benefit of the provisions of s. 58 of the Metropolitan Poor Act, 1867, I am of opinion that it is no answer to the present application for a mandamus. In the first place, as pointed out by Lord Macnaghten in *Pasmore's Case* (1), the general rule to which I have already referred admits of exceptions, which must depend on the scope and language of the Act which creates the obligation, and on considerations of policy and convenience. If ever an exception to the rule should be admitted, it should be in the present case. The suggested remedy is so ludicrously inadequate that it seems to be a misuse of language to call it a remedy at all. *Barwick* v. *South Eastern Ry. Co.* (2) and *Simmonds* v. *Newport Abercarn Coal Co.* (3) are both cases in this Court in which it was held that a statutory remedy was so inappropriate that it must not be regarded as exclusive. In the second place, in spite of the decision in *Rex* v. *Bermondsey Borough Council* (4), I venture to doubt whether the statutes, which give power to levy distress upon the goods of individual overseers, apply to the goods of a borough council merely because the statute of 1899 directs that the council of each borough shall be the overseers of every parish within their borough.

For these reasons I think that both appeals fail, and must be dismissed with costs.

WARRINGTON L.J. These are two appeals by the council of the Metropolitan Borough of Poplar (which I will hereinafter refer to as the Poplar Borough Council) against two orders of the King's Bench Division, ordering the issue of a peremptory writ of mandamus directed to the Poplar Borough Council commanding them to pay, in the one case to the London County Council a sum of money due under a precept dated May 10, 1921, and in the other to the Managers of the

(1) [1898] A. C. 397.
(2) [1921] 1 K. B. 187.
(3) [1921] 1 K. B. 616.
(4) 72 J. P. 330.

Metropolitan Asylum District two sums due by virtue of a precept of the said managers to the guardians of the poor of Poplar dated April 9, 1921, and in each case if necessary to make and levy a rate for that purpose.

I will deal first with the case in which the writ was issued on the application of the London County Council. The sum mentioned in the order is a sum of money duly apportioned to the borough of Poplar as their proportion of the county rate. It is not disputed that the precept for the sum mentioned in the order was duly sent to the Poplar Borough Council as the overseers (London Government Act, 1899, s. 11, sub-s. 1), or that the council as such overseers were by virtue of the same provision and of sub-s. 2 of the same section bound to execute the precept by paying the amount thereof to the London County Council. But it was contended (1.) that, as by the Act imposing the duty to pay a remedy was provided for recovering the money, that remedy and that alone can be resorted to; and (2.) that, even if this is not so, then inasmuch as the issue of the writ is in the discretion of the Court, the existence of that other remedy is sufficient reason for refusing to direct the writ to issue.

As to the first point, the appellants rely on the principle that "where an Act creates an obligation, and enforces the performance in a specified manner," it is "a general rule that performance cannot be enforced in any other manner": *Doe* v. *Bridges* (1); and they cite the judgment of Lord Halsbury in *Pasmore* v. *Oswaldtwistle Urban Council.* (2) The remedy alleged in the present case is that of personal distress upon the goods of the overseer making default who is described in the statute as the offender (County Rates Act, 1852, s. 28), and is punitive. I cannot think that distress upon the goods of an overseer, who might well be possessed of goods of trifling value, could have been intended to be the only remedy for recovery of the portion due from a parish of the county rate. Lord Macnaghten in the case above cited says (3): "Whether the general rule is to prevail, or an exception to

(1) 1 B. & Ad. 859. (2) [1898] A. C. 387.
(3) [1898] A. C. 397.

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the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience." I am clearly of opinion that the present case does not fall within the general rule. But there is a further answer which is in my opinion fatal—namely, that the Act of 1899 which imposes the duty on the council does not give the remedy. This is given by another Act—namely, the County Rates Act, 1852. In my opinion the first ground of appeal fails.

As to the second: The issue of the writ is no doubt discretionary, and it has been laid down that where there is a remedy equally convenient, beneficial, and effectual a mandamus will not be granted: *Reg.* v. *Leicester Union.* (1) But for the reasons given by the learned judge in the Court below it seems to me that the alternative remedy by distress on the goods of the Poplar Borough Council is certainly not equally convenient, beneficial, or effectual with the writ of mandamus. This second ground of appeal also fails.

In the case of the Managers of the Metropolitan Asylum District, the liability arises under the Metropolitan Poor Act, 1867, and it is admitted in this case also that the precept was duly issued, and that the borough council as overseers are liable to pay under s. 58 of that Act. The alternative remedy suggested in this case is again a right to distrain conferred by s. 1 of the Poor Rate Act, 1839. Assuming that such an alternative remedy is operative, the observations I have made in the previous case as to the alternative remedy there relied on apply to the alternative remedy in the present case and need not be repeated. In my opinion both appeals fail and must be dismissed.

SCRUTTON L.J. The Poplar Borough Council appeal against an order of the Divisional Court that a peremptory mandamus should issue directing them to pay to the London County Council and the Managers of the Metropolitan Asylum District certain sums of money due under precepts from the proper authorities respectively and, if necessary, to make and

(1) [1899] 2 Q. B. 632, 639.

levy a rate for that purpose. I do not understand the appellants' counsel to dispute that the borough council are bound in law to pay the money and make the necessary rates for that purpose, and that they are guilty of a breach of their legal duty in not doing so. The attitude of the borough council is that to levy a rate to meet the precepts of the county council and the managers would impose too great a burden upon the poorer classes of their ratepayers, and therefore they do not propose even to try and collect the money. They take the same attitude with regard to the precepts for the Metropolitan Police and Metropolitan Water Board. I notice that, though they do not propose to pay for the services rendered by these four bodies, they have not discontinued availing themselves of these services, and they would probably be very indignant if their borough were deprived of the services for which they object to pay. But the question is not as to any moral justification of their attitude; it is admitted to be a breach of their legal duty. Their defence to this application is that mandamus is not the legal remedy; first, because there is another equally appropriate and efficient remedy, to distrain on the goods of the council; secondly (though I do not think this point was clearly and prominently put forward in the Court below), because the Act creating the duty also gives the remedy, which is therefore the only remedy available, whether efficient or not.

The cases of the two respondents vary slightly, and I take first the case of the London County Council. The duty of the borough council to obey the precept of the county council for the levying and payment of county rates rests on the London Government Act, 1899. By s. 11, sub-s. 2, every precept issued by any authority in London for the purpose of obtaining money which is ultimately to be raised out of a rate within a borough shall be sent to the borough council at their office, and "shall be executed by them." It is this duty which the borough council have failed to observe in regard to a precept issued by the London County Council, and the duty is created by this statute. I do not find any remedy

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for the breach of this duty created by this statute, and for this reason I think the objection based on statutory remedies fails in the case of the London County Council. I understand the argument of the appellants to be that, as the Act of 1899 creates the borough council overseers, it therefore renders them liable for breach of the new duty created by the Act of 1899 to the penalty to which overseers would have been liable for the breach of the old and different duty imposed on overseers by the County Rates Act, 1852, to pay warrants issued by justices in default of payment of precepts by guardians. The Act of 1899 does not say so, and I think Mr. Macmorran is right in arguing that this remedy is not attached to the new duty, in which case the appellants' point about limitation to prescribed statutory remedies fails, for there is no prescribed statutory remedy. Should, however, the appellants' view be right, that the old remedy is attached to the new statutory duty, the position becomes similar to that of the Managers of the Metropolitan Asylum District, to which I now turn.

The Act of 1899, by s. 11, sub-s. 2, exempts from its operation precepts sent to guardians by a body containing representatives elected by the guardians. This covers the Managers of the Metropolitan Asylum District. We are then sent to 30 & 31 Vict. c. 6, s. 58, which gives to such a body the same remedies against overseers as are given by s. 28 of the County Rates Act, 1852, against overseers who fail to obey the warrants of justices to pay precepts. One thing is clear, that such a remedy is ludicrously inapplicable to the present default. To seize the personal goods of the borough council, whether this means goods owned by the council as such, such as water carts, or the personal goods of the members of the council, would be quite insufficient to produce even the first instalment of the precept; it would have to be repeated monthly for four months. Either the council would buy the goods back again on the first distress, to have them seized again on the second distress, or if the council submitted to being deprived of the goods on the first distress, there would be no goods to seize on the second distress, and the council

would be deprived of the means to carry on essential services. Under these circumstances the suggested alternative remedy is quite inefficient to produce the result aimed at, the performance of the statutory public duty, and is indeed obviously in its origin a personal punishment on the individuals who do not perform it, rather than a means of getting the duty performed. This Court has twice in the last year declined to limit applicants to a statutory remedy when that remedy would not secure the result the statute intended to effect. In *Barwick* v. *South Eastern Ry. Co.* (1) it was argued that the liability to rates should be ascertained before magistrates in the way provided by the Act. The Court pointed out why such proceedings would not attain the desired result, and declined to limit the applicants to the statutory remedy. Again in *Simmonds* v. *Newport Abercarn Coal Co.* (2) the Court declined to limit the applicant under the Coal Mines Act, 1911, to the remedy for penalties by proceedings before magistrates given in the Act, because it would not secure the performance of the duty owed to the applicant. This is a view taken in many early cases, where the punishment of the defaulter does not secure the performance of the statutory duty. For instance, in *Reg.* v. *Victoria Park Co.* (3) Lord Denman said: "It was argued that we have issued the writ, even where there was a legal remedy, in cases where that remedy was not so complete and beneficial as the writ would enforce. But that has been where the remedy at law was not in its nature so complete, without reference to any circumstances peculiar to the case in which it was to be used, as in *Rex* v. *Severn and Wye Ry. Co.* (4), where a mandamus was granted to compel a corporation to reinstate and lay down a railway, although an indictment would have lain for the non-repair; for the only direct effect of the indictment would have been the punishment of the defendants by fine, and not procuring for the prosecutors the benefit which they sought and were entitled to." In that case the Court refused to grant a

(1) [1921] 1 K. B. 187.
(2) [1921] 1 K. B. 616.
(3) (1841) 1 Q. B. 288, 291.
(4) (1819) 2 B. & Al. 646.

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mandamus to pay money and make calls to raise it, where it was proved that the company had no money, no officials who could make calls, and that the last calls made had not been paid. But it would be otherwise, where as in *Reg.* v. *Birmingham Ry. Co.* (1) the company had not used their statutory powers at a time when they could have used them. In the present case it is clear that some of the ratepayers could pay a rate if made; it is not clear that a rate would not raise the money sufficient to pay the precepts, and it is not clear that the money difficulty of the council does not arise from their expenditure in other directions without regard to existing legal obligations.

As pointed out by Lord Macnaghten in the *Oswaldtwistle Case* (2) the enforcement of the rule of limitation of enforcement of a statutory right to the statutory remedy must depend on the scope of the Act, and on considerations of policy and convenience, by which I understand to be meant that, where the performance of the statutory obligation will not be ensured by the statutory remedy, the importance from a view of policy of securing the performance of the statutory obligation may lead the Court to grant other remedies than the statutory one. Mandamus is the regular remedy where it is desired to compel a public body to fulfil a public duty which they without legal excuse decline to perform, and in my opinion it is the only suitable and convenient course in this case. I am of opinion that the respondents are not limited to the statutory remedy; in the case of the London County Council, because none is prescribed; in the case of the Metropolitan Asylums Board, because the statutory remedy is by way of punishment, and in this case will not ensure performance. I am further of opinion that mandamus is by far the most convenient and effective remedy for the admitted breach of their legal duty committed by the borough council. The appeals therefore should be dismissed with costs.

I hope I appreciate the consideration of the borough council for the poorer ratepayers of a poor borough, but if the burdens of the expenses of administration of London

(1) (1841) 2 Q. B. 47, 61, 62. (2) [1898] A. C. 397.

press unequally on various parts of that vast area, the remedy is not "direct" or illegal action, but bringing the matter before the attention of Parliament. If every public body which thinks its constituency overrated is to be allowed to decline to pay its legal debts, the whole machinery of administration must speedily break down. The Poplar Borough Council will not be able to govern their area unless they can rely on their legal demands being obeyed even by those who disapprove of them; and they should, in my opinion, consider very carefully the great responsibility they incur when they set to other and more ignorant people an example of disobedience to law.

Appeals dismissed.

Solicitors for appellants: *Scott Duckers & Thompson.*
Solicitor for London County Council: *D. P. Andrews.*
Solicitors for Managers of Metropolitan Asylum District: *Williams & James.*

W. F. B.

[IN THE COURT OF APPEAL.]

THE KING *v.* THE COUNCIL OF THE METROPOLITAN BOROUGH OF POPLAR.

Ex parte THE LONDON COUNTY COUNCIL.

SAME *v.* SAME.

Ex parte THE MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT. [No. 2.]

Rate—Metropolis—County Rate—Contributions to Metropolitan Asylums District Rate—Non-payment by Borough Council as Overseers—Mandamus—Rule nisi for Attachment—Irregularity—Rule against Borough Council alone—Individual Members of Council not named in Rule—Omission to serve Affidavit on individual Members specifying nature of Contempt—Affidavit of Members justifying Contempt—Appearance at hearing of Application for Rule absolute—Waiver of Irregularity.

A corporation, which is a notional body, cannot be attached for disobedience to a writ of mandamus issued against it.

A mandamus addressed to a corporate body whose actions are not

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controlled by a governing body is a command addressed to every member of that body.

If it is sought to attach individual members of such a corporation for disobedience to a writ of mandamus, the proper course is to insert their names in the rule nisi and to serve it on each of the members so named personally together with a copy of an affidavit specifying the nature of the contempt with which he is charged.

Two precepts were served upon a metropolitan borough council requiring them to pay certain sums or to levy rates for that purpose. The council having failed to do this, the precepting authorities obtained peremptory writs of mandamus against them. No return having been made to the writs, and the council having declined to make the rates, the precepting authorities obtained rules nisi for attachment against the council. The rules required the council to show cause why writs of attachment should not be issued "against them or every of them," but did not mention the names of the persons sought to be attached. They were served upon some only of the members, together with affidavits of the precepting authorities in support, which were defective in that they did not specify the contempt with which each member was charged. Some twenty-seven of the members made a joint affidavit in reply, in which they stated their reasons for refusing to make the rates and persisted in their refusal. At the hearing of the applications for rules absolute some eleven or twelve addressed the Court in support of their refusal. The Divisional Court directed writs of attachment to issue both against the council and certain of the individual members. On appeal:—

Held, the orders against the council could not be supported and must be discharged.

Held, also, that the proceedings against the individual members of the council were irregular in that their names were not inserted in the rules nisi for attachment, and that each member was not served with an affidavit specifying the nature of the contempt with which he was charged

But, *held*, that the irregularity was one that could be waived, and had in fact been waived by some of the members by their joining in the affidavits and by addressing the Court to the effect that they intended to persevere in their disobedience to the writs of mandamus.

Reg. v. *Ledgard* (1841) 1 Q. B. 616 followed. Statement in Buller's Nisi Prius, 7th ed., pp. 201, 202 approved.

Decision of Divisional Court affirmed.

APPEALS from two orders of the Divisional Court made upon the application of the London County Council and the Managers of the Metropolitan Asylum District respectively directing writs of attachment to issue against the Council of the Metropolitan Borough of Poplar and certain individual members of that council for disobedience to two writs of peremptory mandamus.

The facts of the first case, which are more fully stated in the judgment of the Master of the Rolls, were as follows:

On June 3, 1921, a rule nisi for a mandamus was granted at the instance of the London County Council by which it was ordered that Monday, June 20 instant, be peremptorily given to the Council of the Metropolitan Borough of Poplar (hereinafter called the defendant council) to show cause why a writ of mandamus should not issue directed to them commanding them to pay to the London County Council the sum of 33,944*l.* 10*s.* 6*d.*, the first instalment due under a precept of the said London County Council dated May 10, 1921, and if necessary to make and levy a rate for that purpose on the ground that the said sum was due and unpaid and the said defendant council had failed and refused to pay the said sum and to exercise their statutory powers in that behalf to provide such payment.

The defendant council having failed to comply with the rule nisi, the rule was on July 7, 1921, made absolute by a Divisional Court (Lawrence C.J., Sankey and Branson JJ.).

On July 9, 1921, a peremptory writ of mandamus was accordingly issued at the instance of the London County Council against the defendant council requiring them to execute the precept or to cause to be paid the said instalment and if necessary to make or levy a rate for that purpose. The writ of mandamus was served on forty-one out of the forty-eight members of the defendant council.

The defendant council appealed from the order of the Divisional Court, but their appeal was dismissed on July 27, 1921 (see ante, p. 72, where the facts leading up to the making of the rule absolute for a mandamus are fully stated).

The writ of mandamus not having been obeyed, on July 25, 1921, a rule nisi for attachment was obtained at the instance of the London County Council whereby it was ordered "that Friday the 29th day of July instant be peremptorily given to the defendant council to show cause why a writ or writs of attachment should not issue against them or every of them for their contempt in not obeying the peremptory writ of mandamus directed to them."

The rule nisi together with an affidavit of Mr. D. P. Andrews, the solicitor of the London County Council, filed

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in support of the application for the rule was served upon the mayor, the town clerk and thirty of the aldermen and councillors of the defendant council. In that affidavit Mr. Andrews deposed that the writ of mandamus was handed by him to a law clerk in his department with instructions to serve it upon the town clerk and the mayor and aldermen and councillors of the defendant council; and that the defendant council had not paid the instalment of 33,944*l.* 10*s.* 6*d.* as they were peremptorily commanded to do by the writ of mandamus.

On July 29, 1921, the motion to make absolute the rule for attachment came on before the Divisional Court (A. T. Lawrence L.C.J., Bray and Sankey JJ.). In opposition to the motion a joint affidavit by twenty-seven members of the defendant council was read in which they deposed (inter alia) as follows: 5. "The said Borough Council is not in a position to pay the said sum of 33,944*l.* 10*s.* 6*d.* The banking account at the present time is overdrawn to the extent of approximately 21,000*l.*" 6. "The distress in Poplar has become accentuated since these proceedings were commenced. We are of opinion that the facts set out in the said affidavit of Sam Marsh and others left us no other course than the one adopted. The experience gained since these proceedings were commenced has fortified us in that view and we believe that it would be useless further to levy the ratepayers as such rate could not be collected." 7. "In the circumstances of the case we submit that the issue of a writ of attachment against the members of the said Borough Council would prejudice beyond correction the rights of the said Borough Council in their appeal to the House of Lords and would have the effect of denying justice to the said Borough Council; further we submit that the result of the issue of such writ of attachment and the imprisonment of the members of the Council would confer no benefit upon any of the parties and would produce much greater chaos than the refusal to levy the rate has produced." In addition to this affidavit seventeen members of the defendant council addressed the Court to the same effect.

The Court being of opinion that the defendant council were in contempt ordered that writs or writs of attachment should issue against the defendant council and the individual members before the Court, but directed that the order should lie in the Crown Office for fourteen days from the date of the order.

Similar proceedings were taken at the instance of the Managers of the Metropolitan Asylum District with reference to two sums of 7036*l.* each due to them from the defendant council under and by virtue of a precept of the said managers to the guardians of the poor of the parish of Poplar dated April 9, 1921, and a similar order for attachment was made by the Divisional Court.

The defendant council and the individual members of the defendant council against whom the writs of attachment were directed to issue by the respective orders appealed against. The two appeals were heard together on August 4, 1921.

Disturnal K.C. and *H. H. Slesser* for the defendant council and the individual members on both appeals. In each case the order for attachment appealed against is issued against the defendant council and against certain individual members. In any event the writ of attachment against the council in its corporate capacity must be incorrect; as regards the individuals, in the order obtained by the London County Council twenty-seven individuals are named, five of whom are not named in the order obtained by the Metropolitan Asylums Board, and in the order obtained by the latter body twenty-six individuals are named, four of whom are not named in the order obtained by the London County Council. The rule nisi for the writ of mandamus calling upon the defendant council to show cause why they should not levy a rate to meet the precepts is directed to the defendant council and was obtained upon an affidavit which set out the contempt of the corporate body alone. The rule absolute for attachment is against the defendant council as a body and individual members. It is submitted that the Court cannot attach individual members of a corporate body for failure to do something which only that

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corporate body can do unless it is shown that the particular individuals are personally guilty of contempt and have been served with an affidavit which alleges the nature of the contempt charged. Here no such affidavit was served upon any of the individual members. The contempt suggested cannot be by any individual, because no individual can perform the particular act the omission of which is complained of. The present case is governed by *Reg.* v. *Ledgard* (1), where on a mandamus issued against the mayor, alderman and burgesses in their corporate capacity it was sought to attach the individual members who had been served with the writ and it was held that this could not be done. That case shows that the individuals sought to be attached must be informed of the case they have to meet. Where a mandamus is directed to a corporation to do a corporate act and no return is made an attachment is granted only against those persons who refuse to pay obedience to the mandamus: Buller's Nisi Prius, 7th ed., pp. 201–2. But it is necessary to show that they have been guilty of contempt. It is not disputed that the individuals in the present case might be attached provided that the proceedings against them were properly framed: *Reg.* v. *Mayor of Hereford.* (2)

In *Harman* v. *Tappenden* (3) a form of mandamus applicable to cases like the present is to be found. Here it would have been perfectly easy for the London County Council to have obtained a mandamus against the individual members of the defendant council in something like the form in that case. It is therefore not true to say that there is deadlock.

[YOUNGER L.J. referred to Order XLII., r. 31, and Crown Office Rules, 1906, r. 207.]

It is not contended that the individual members of a corporation cannot be guilty of disobedience to an order directed against the corporation or that they cannot be attached if proper proceedings are taken against them. But to render them liable they must be served with the order and with the evidence in support of application to attach and that

(1) 1 Q. B. 616. (2) (1705) 2 Salk. 701.
(3) (1801) 1 East, 555.

was not done in this case. Their appearance at the hearing in the application to attach before the Divisional Court did not waive the non-compliance with these formalities.

[LORD STERNDALE M.R. Your strongest point is that for some inconceivable reason the prosecutors left out the names of some individuals whom they wished to attach and proceeded against them under the words "and every of you" and did not serve any evidence except evidence that showed that the whole council was in default.]

[They also referred to *Rex* v. *Worcester Corporation*. (1)]

Macmorran K.C. and *E. H. Tindal Atkinson* for the London County Council; *Macmorran K.C.* and *C. Herbert-Smith* for the Managers of the Metropolitan Asylum District. The law is clear that individuals can be made responsible for the non-performance of acts by a corporate body.

In *Rex* v. *Inhabitants of Wix* (2) it was said that a mandamus could not go against the parishioners, but that a writ might be directed to the inhabitants and those inhabitants upon whom it was served might be punished for disobedience to it. That was a case in which a mandamus was addressed to a large number of persons but not by name.

[LORD STERNDALE M.R. The question is whether you have adopted the right procedure. Is there any case in which persons have been attached where only the body of which they are members is mentioned in the rule nisi for attachment?]

No.

[YOUNGER L.J. referred to *McKeown* v. *Joint Stock Institute*. (3)]

The writ of mandamus was addressed to the defendant council "and every of you." Those words must mean "and every member of the defendant council." It was served on forty-one members and therefore every one of those members must be taken to have had notice of what he was required to do and what the defendant council was required to do. Nothing was done and no return was made to the writ.

(1) (1903) 68 J. P. 130. (2) (1831) 2 B. & Ad. 197, 199, 203.
(3) [1899] 1 Ch. 671.

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The rule nisi for attachment was issued and was served on the members, a large number of whom made answer by affidavit.

[YOUNGER L.J. I cannot understand why the forty-one names were not put into the rule nisi for attachment.

LORD STERNDALE M.R. The names were put in in *Reg.* v. *Ledgard.* (1)]

The point is the merest technicality. Persons who have knowledge of the matters from the commencement ought not to be allowed to come here and say that they were not mentioned by name. The joint affidavit shows that they were aware that proceedings were being taken against them personally. It cannot therefore, in the circumstances, be said that the mere fact that they were not mentioned by name is a defence. It is submitted therefore that the order ought to go against them notwithstanding that they were not named in the rule nisi for attachment. The Court ought not to extend the case of a mere technicality to cover a case like the present where the parties knew all the facts and have shown that they understand that action is being taken against them as individuals.

The practice as to committal is quite different from that as to attachment.

[LORD STERNDALE M.R. Do you wish to maintain the order against the defendant council as a council ?]

No.

Disturnal K.C. in reply. If it is desired to attach individuals for contempt they must be mentioned by name in the rule nisi for attachment. Here the individuals in question were not so mentioned, but the respondents seek to get over that difficulty by relying on the service on them of the affidavit in support. It is essential that every one who is being proceeded against should know with what he is charged. The only question here is whether the irregularity in this case can be waived by the appellants. It is submitted that it cannot be. The joint affidavit does not waive the question of jurisdiction.

(1) 1 Q. B. 616.

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LORD STERNDALE M.R. These are appeals from two orders of the Divisional Court, directing writs of attachment to issue against the metropolitan borough of Poplar, and also against individual members of that council. In one sense, there is no substance in the appeals, but in another sense there is considerable substance. The reason I say that in one sense there is no substance in them is that there is no question whatever that the individual members against whom the writs of attachment were issued have not obeyed and have no intention of obeying the orders of the Court. The learned Lord Chief Justice has said that the individuals concerned have taken up the position they have from conscientious motives. I have no wish in any way to differ from that statement, but I think it is necessary to point out that that fact is quite immaterial. Unless and until the time comes when the law of this country is that a person may disobey an order of the Court or the laws as much as he likes if he does it conscientiously the question of motive is immaterial. That is not the law at present. There have been instances in which by statute conscientious motives have been stated to be, and have been constituted, sufficient reason for not obeying the law. But this is not a case that comes within any of those exceptional statutes. The fact that such exceptional statutes were necessary to make conscientious motives a justification of disobeying the law shows that the general law is not to that effect. The question therefore whether the members of the defendant council here acted conscientiously or not, has, in my opinion, nothing to do with the matter. They deliberately intend to continue to disobey the orders of the Court, as they have done up till now.

But in another sense there is considerable substance in the appeals—namely, that by these orders undoubtedly the liberty of the subject is affected, and it is a matter of great public importance that the liberty of the subject should not be affected except in the strictest form of law.

What happened, as far as it is necessary to state the facts, is this: the defendant council received precepts from

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the London County Council and from the Metropolitan Asylums Board, in accordance with the statutes regulating the issue of such precepts. On receipt of those precepts it was the duty of the defendant council to levy a rate to raise the money which was required by the precepts. They declined to do so on the ground that the borough of Poplar was a poor borough, that their account was already overdrawn, that the rates were at present extremely high and would be abnormally and extraordinarily high if the rate was levied to pay the sums mentioned in the precepts; and because the members of the defendant council were of opinion that these precepts should not be issued to individual boroughs so long as the present system of rating existed but that there should be an equalisation of rates over the whole of the metropolis, and that these precepts should be issued to the whole, so that the burden that fell upon the poor districts should be very much lightened. The latter point, as the Lord Chief Justice said, is a political matter of great difficulty. We all know that at the present time the burden of rates and taxes is crushing, and there are those who think, possibly rightly, that until that burden is in some way lightened the country will not be as prosperous as it ought to be. But that is a matter with which the Court has nothing to do. It is quite clear that the state of the country will not be improved if every subject takes it upon himself to decide whether or not he will obey the law. That would produce, as the Lord Chief Justice said, a state of anarchy. Therefore the law has to be enforced, as far as it can be.

When the defendant council declined and failed to levy the rate, both of the two bodies, who issued the precepts, applied for a writ of mandamus. On the application of the London County Council a peremptory writ of mandamus was issued commanding "the said Council and every of you, firmly enjoining you that you do pay or cause to be paid, to the Treasurer of the County of London the said instalment of 33,944*l.* 10*s.* 6*d.* and if necessary do make and levy a rate for that purpose lest by your default the same complaint should be repeated to us and how you have executed this

Our writ make known to Us" and so on. It is agreed that the defendant council is a corporate body constituted under the London Government Act, 1899, and that the council mentioned in the writ, the defendant council, is not a mere name for a collection of individuals, but that it is a corporate body to whom the mandamus is addressed. That mandamus was not obeyed, and it is, I think, quite clear, according to the practice of the Courts and the cases which have been cited to us, that where a writ of that kind is addressed to a corporate body, which can only act by the persons who compose it, if it is not obeyed, those persons can be attached for not obeying it; and that they cannot say: "This mandamus is addressed only to a corporate body, and we are only individuals, and we are not commanded to do the act required to be done; and therefore it does not impose any obligation upon us"; but that, if it be not obeyed, the individual members who have control of the corporation are liable to be attached. In this matter the Crown Office follows the well-established rule (Crown Office Rules, 1906, r. 55), that "Unless the Court or judge otherwise direct, when a writ of mandamus is directed to companies, corporations, justices, or public bodies, service shall be made upon such and so many persons as are competent to do the act required to be done," thereby recognizing the fact that a corporation can only act by the individuals who control it. I think, from a remark made by Mr. Lansbury, after the judgment of the Divisional Court had been delivered, that he was contending that individuals who have the control of a corporation could not be attached because the corporation had not obeyed the mandamus. If that was his contention it was, in my opinion, wrong, as is shown by the authorities and the practice.

The question then arises how is that obligation to be enforced against the individual members who have control of the corporation? I think there is quite sufficient to show that the regular and proper course of procedure is by getting a rule nisi for attachment against the individuals, naming them in the rule, and serving them with the rule nisi when

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obtained and the evidence which it is proposed to adduce against them as individuals. That procedure was not adopted in this case, and I have been unable to see any reason why it was not. I will allude to what was done in this case directly, but I can see no reason why the ordinary procedure, where it is desired to attach individuals, of naming them was not followed. It might have been that in the circumstances of the case it would have been necessary to name all the members of the council—if so, it should have been done. But what was done was this. A rule nisi for attachment was obtained in this form (omitting the preliminary part): "It is ordered that Friday the 29th day of July instant be peremptorily given to the defendant council to show cause why a writ or writs of attachment should not issue against them or every of them for their contempt in not obeying the peremptory writ of mandamus directed to them commanding them to pay to the London County Council, the sum of 33,944*l.* 10*s.* 6*d.* the first instalment due under a precept of the said London County Council dated the 10th day of May, 1921, and if necessary to make and levy a rate for that purpose." It will be noticed that the rule nisi gives a day to the defendant council to show cause why a writ or writs of attachment should not issue against them or every of them. The words " or every of them " are extraordinarily difficult words to which to attach any. meaning, because the day is given to the council, and in my opinion the regular course should have been followed of inserting the names of the individuals whom it was proposed to attach in the rule nisi. The rule nisi and the evidence proposed to be adduced in support of it was served upon, I think, some thirty-one members, at any rate a considerable number of members of the defendant council, but not upon all. The evidence consisted of an affidavit of Mr. Andrews, the solicitor to the London County Council, and I have no doubt there was another affidavit with regard to the Metropolitan Asylums Board, but I have not troubled about that. Mr. Andrews in his affidavit states: "The said writ of mandamus was handed to Edgar John Tiffen, a law clerk in my department, with

instructions to serve the same upon James Buteux Skeggs, town clerk, and the Mayor and Aldermen and Councillors of the said Metropolitan Borough of Poplar," and then he goes on to say that he has received a printed list of the names and addresses of the said mayor, aldermen and councillors. "The said Council of the Metropolitan Borough of Poplar have not paid the instalment of 33,944*l.* 10*s.* 6*d.* (being an instalment of the county rate) as they were peremptorily commanded to do by the said writ of mandamus. I have made due inquiry of the Crown Office of this Honourable Court, and am informed that the said Council of the Metropolitan Borough have not returned the said writ of mandamus to this Honourable Court setting out the manner in which they, the said Council of the Metropolitan Borough of Poplar, had executed the same as they were peremptorily ordered to do." If all the members of the council had been mentioned in the rule and this affidavit had been served upon all of them, I think according to the authorities that there would have been a prima facie case of disobedience by all of them, and they would then have had to show cause, each of them, that they were not personally guilty of the disobedience to the mandamus. The rule and the affidavit were not however served upon all; they were served only upon certain members and none of the members so served were named in the rule. But for matters I shall have to mention directly, I should have been of opinion that there was not sufficient to call upon the members so served to show cause why the writ of attachment should not issue, because the prima facie disobedience which is shown by that affidavit, does not necessarily attach to those persons upon whom it was served any more than upon those upon whom it was not served, and there was nothing in it which pointed to them individually. But it is quite clear that however difficult the words in the rule nisi are to understand, and however irregular the form of the rule nisi was, as I think it was, those words were clearly understood by the persons upon whom the rule and the affidavit were served, as applying to them and intending to call upon them for their defence, and charge them with

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disobedience to the rule. That seems to me perfectly clear from the fact that in the case of the rule nisi issued at the instance of the London County Council twenty-six members including Mr. Lansbury and in the case of that issued at the instance of the Metropolitan Asylums Board twenty-two members filed a joint affidavit giving their reasons for acting as they had done in not making the rate and taking the necessary steps to get it levied, and also pointing out that the result of the issue of such a writ of attachment and the imprisonment of the members of the council would confer no benefit upon any of the parties. It was, therefore, clearly understood by the deponents to that affidavit, that this procedure was intended, and the words, however difficult, did apply to them individually. The reason why the names of the individual members should be given and the evidence served upon the members personally, is stated by Lord Denman in *Reg.* v. *Ledgard* (1) to which we were referred: "It is common justice that, where individuals are to be charged with contempt and threatened with attachment, they should have the opportunity of exculpating themselves." Now however irregular this rule and these proceedings may have been, it is perfectly clear that these twenty-six deponents did understand, as I have said, that attachment was sought against them, and they did take advantage of the opportunity given them of exculpating themselves—or rather did not attempt to exculpate themselves. They said: "We did it for the reasons we have stated and we think we were right." In addition to that, a considerable number of members of the defendant council attended at the hearing of the argument of the rule, and some ten or eleven at any rate of them made speeches and addressed the Court. Counsel was only instructed on behalf of the defendant council and the judgment of the Divisional Court does not in any way deal with the point and the only real point that was argued before us—namely, the irregularity of the proceedings for attachment. Learned counsel were not instructed on their behalf, and those members who

(1) 1 Q. B. 616, 619.

appeared, with the exception of one whom I will mention directly, seem to have directed their attention almost entirely, not to the legal point at all, but to justifying to the Court or to the public, the motives and reasons of their actions. Therefore the point was not very much discussed. Mr. Lansbury, it is true, in his address to the Court, did point out and did say that without mentioning him by name and serving the particular evidence upon him, he ought not to be sent to prison. As a matter of fact he was one of the deponents to the joint affidavit I have mentioned and he therefore also knew, although he was not mentioned by name, that attachment was being sought against him; and he then went on to state directly to the Court, that he did not intend to obey the order of the Court, and that the order for attachment, if it was made, must inevitably result in imprisonment, because he—and although he was only appearing for himself, he said he was speaking for others in Court—and others did not intend to levy this rate.

In these circumstances the question is whether this writ of attachment is bad, because of the irregularities that I have pointed out in the rule nisi and because the evidence would not have been sufficient against the individuals although it might have been sufficient against the whole of the council if all the members of the council had been named. As I said, I do not think that affidavit was sufficient against the individuals by itself; but when the evidence of that affidavit is supplemented by the fact that an affidavit is filed by twenty-six of the persons who were served, and when also a number of them appear in Court and address the Court in a way which certainly that Court understood as being an avowal of an intention still to disobey the mandamus, then, in my opinion, there was sufficient evidence. The effect of the speeches that were made was for the Court itself and not for us to judge. The affidavit we have before us and we can judge of its effect. In my opinion there was an irregularity, but it was an irregularity which could be waived and was, I think, waived when the individuals in question, understanding, as I pointed out, quite well, however difficult the

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language of the rule nisi might be, that attachment was sought against them, chose to file affidavits showing that they did not intend to obey the order, and also address the Court to the same effect. I think that, by appearing and taking that course, they did waive the irregularity and therefore with regard to those individuals the appeal fails.

I think therefore the rule must go against such of the individual members as have joined in the affidavits or appeared and made statements to the Court.

With regard to the writ of attachment against the council, the respondents do not seek to support the order, and indeed it cannot be supported from any point of view. If this be a corporate body, a notional body of this kind cannot be attached and put in prison. Even if it were merely a collective name for a number of individuals, the writ of attachment would be equally wrong, because its effect would be to commit to prison all the members of the defendant council whether they had done their best to get the rate levied or whether they had not. The order therefore so far as the defendant council is concerned cannot in any view be supported and therefore that part of the appeal must be allowed, and it follows that the order that was made on the defendant council to pay the costs must be discharged : because if the defendant council cannot be attached, it ought not to be called upon to pay the costs of persons seeking to attach it. No order was made as to the costs of the individual members, and considering that the appeal has succeeded to a certain extent and in view of the difficulties caused by the irregularities of the procedure, in my opinion the appeal should be allowed as to the attachment of the defendant council and dismissed as to that of the individual members I have mentioned ; but there should be no costs of the proceedings either here or below.

WARRINGTON L.J. I am of the same opinion. These are two appeals from two separate orders of attachment against the Council of the Metropolitan Borough of Poplar and certain individual members of that council for disobedience

to two writs of peremptory mandamus, one obtained by the London County Council and the other obtained by the Managers of the Metropolitan Asylum District. The Council of the Metropolitan Borough of Poplar was constituted under the London Government Act, 1899. It is incorporated by an Order in Council issued under that Act; and under the Act it consists of a mayor, aldermen and councillors. It is a corporation then of this nature: that its actions are not controlled by a separate governing body but are under the control of the whole of what I may call the corporators of the council, the members of the council. Against that body there have been issued two writs of mandamus: I propose to refer to only one of them, that which was obtained on the prosecution of the London County Council. That is a peremptory writ whereby the King peremptorily commands the "council and every of you, firmly enjoining you that you do pay or cause to be paid to the Treasurer of the County of London" a certain sum of 33,000*l.* odd "and if necessary to make and levy a rate for that purpose." In my judgment, it has been settled by authority for many years that a writ of mandamus of that nature addressed to a corporation such as this, which has no separate governing body, is a command addressed to every individual member of the council. Sufficient authority for that, I think, is found in the statement in Buller's Nisi Prius, 7th ed., pp. 201, 202, where in speaking of prerogative writs of mandamus the learned author says: "So if no return be made, the Court will grant an attachment against the persons to whom the *mandamus* was directed: with this difference, however, that where a *mandamus* is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the *mandamus*." Although that statement is put in the form in which I have read it, it is clear that it assumes that the members of the corporation, who control its actions, are under obligation to obey the commands given by the writ and that those who do not obey, by proper proceedings, can be proceeded against for

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attachment. Again in *Reg.* v. *Ledgard* (1) in 1841 Lord Denman in the course of the argument said: "Where no return is made, a peremptory mandamus issues against those persons to whom the mandamus was directed; but it should seem that an attachment ought to be granted only against those particular persons who refuse to pay obedience." That, again, assumes that it would be granted against those who do refuse obedience. "Here," he said, "the attachment is moved for against the whole body: whereas the governing body is only the town council." Now the defect in that particular case does not exist in the present case, because in the present, the governing body of the corporation is the whole body of corporators, that is to say, the whole body of the council, and I think from that judgment of Lord Denman's and from the statement which is made in Buller's Nisi Prius, an ancient book of considerable authority, it is quite plain that the mandamus directed to such a body as that with which we have to deal, is a command addressed to every member of that body. Now that command has, in this case, not been obeyed and proceedings have been taken for attachment which have resulted in orders from which the appeal is brought. The objection taken by the appellants is an objection to the regularity of the proceedings by which the writs of attachment were obtained; and I accordingly proceed to consider in what respect, if at all, those proceedings were irregular.

For the purpose of proceedings in attachment, certain conditions unquestionably founded on the requirements of natural justice, where it is sought to interfere with the liberty of any person, have to be complied with. The first of those conditions is that the order for disobedience to which it is sought to attach any person, must be shown to have been brought to the knowledge of that person. That was done in the present case, for there was evidence that the writ of peremptory mandamus had been personally served on every one of the persons against whom the writ of attachment has issued. The next condition which has to be fulfilled is, I think, this: that if any individual is going to be treated

(1) 1 Q. B. 616, 619.

as responsible for disobedience to the order, the fact that he is going to be so treated must be brought home to him, and the proper method of bringing home to that individual the fact that it is proposed to proceed against him is to name him either in the notice of motion or in the rule nisi, whichever is the appropriate form of proceeding. In this case that step was not taken, and the effect of that in the circumstances of this particular case, I will consider presently; but I think that there was in the form of the rule nisi for attachment in the present case that defect that it did not name the members of the council against whom it was proposed to proceed; and I can see no excuse. I cannot see why, if the prosecutors were uncertain which of the members had disobeyed the order so as to be liable to attachment, they should not have specified in the rule nisi the name of every member of the corporation, leaving it then to each individual member to show cause against the order being made against himself. However, that was not done, and as I have said, there was, I think, that defect in the procedure. The next step that has to be taken is that the rule nisi or notice of motion, whatever may be the appropriate proceeding, must be served personally upon those whom it is sought to attach. That was done in the present case. No member of the council has been attached except one upon whom both the writ of mandamus and the rule nisi were served. Another point which has to be observed in all such cases is that notice must be given to the persons against whom the proceedings are taken specifying the nature of the contempt for which it is proposed to attach him. That is provided for by the rule which requires that copies of the affidavits which it is proposed to use upon the hearing of the application for attachment shall be served upon the person to be attached. That condition was complied with in the present case. Copies of all the affidavits proposed to be used were served. The sufficiency of those affidavits I will deal with presently. Then, of course, the third direction is that to which I have alluded; that the evidence of disobedience to the command must be sufficient to establish that disobedience. In the present case the

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position stands in this way: the rule nisi was, as I have said, not served upon all the individual members, and one effect of that is certainly this, that it renders defective the affidavit of Mr. Andrews filed in support of the order nisi. That affidavit which states that the council had not done that which it was commanded to do, would be sufficient prima facie evidence against all the members of the council; but when the rule nisi is served upon only some of the members of the council, and none of them are specified in the rule itself, then the affidavit does not afford evidence that any particular member was guilty of disobedience to the writ of mandamus. If matters then had rested there, the order for attachment would, in my opinion, have been obtained irregularly and it would have had to be discharged. But the matter does not rest there. The rule nisi may have been, as Mr. Disturnal has argued, embarrassing in its form, and may not have conveyed sufficiently definite information to the several members affected or intended to be affected that they would have to appear and show cause against the attachment being issued; but nearly all those persons against whom the writ of mandamus has been issued have made it plain that they, at all events, were not embarrassed by the form of the rule nisi. They have all sworn an affidavit in which they avow their contempt and attempt to justify it and state in effect that they do not intend to obey the writ of mandamus and that if they are attached their imprisonment will not secure compliance with the writ, and that it will be, as they say, of no benefit to anybody. If there are any who have been attached who did not join in that affidavit, they appeared in Court and there made statements which were accepted by the Court as amounting to the same effect as the statements made in the affidavit, that is to say, an avowed disobedience to the order and an intention not to obey it. Now having taken that step, it seems to me that it is no longer open to them to object that they were not named in the rule nisi. They have shown by the steps they have taken that they knew the rule nisi was directed to them; they have admitted their contempt, and have remained in contempt; and the

effect of what they have done is twofold; it not only removes the objection to the form of the rule nisi but it supplies the necessary evidence against them as individuals which, as I have pointed out, might not have been contained in the affidavit of Mr. Andrews taken by itself. It seems to me, therefore, that assuming that all the individuals named in the writ of attachment either joined in the joint affidavit or addressed the Court when the order absolute was made, that order was rightly made against those persons. If there are any persons named in the order, and I do not believe there are, who did not either join in the affidavit or address the Court, then I think their names ought to be omitted from it; and, for the reasons stated by my Lord, the name of the defendant council itself ought certainly to be removed from it. I agree with the order proposed as to costs.

YOUNGER L.J. This appeal affects the liberty of the subject, and before that can be interfered with by attachment the Court, unless clearly satisfied that its object has been otherwise fully attained, demands complete compliance with rules of its own designed to protect the individual sought to be attached from the possibility of mischance. The books are full of cases in which, in deference to this cardinal principle, applications for attachment have been refused, even where the defect in procedure has been of a relatively trivial character. My concurrence in the view that this appeal should be dismissed is secured only because it has been made plain to my mind by the attitude of the appellants themselves, both in the Court below and before us, that they have individually suffered nothing by irregularities in procedure, in themselves sufficiently serious to have made the respondents' application for attachment otherwise abortive. The appellants however have shown either by affidavit or by personal statement, and in some instances by both, that no prejudice has accrued to them by these irregularities. They, having had the opportunity presented to them, were not slow to avow that their personal attitude with regard to the order of the Court which has been disobeyed was deliberate

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and considered, and that with full appreciation of the consequences of their disobedience, they have for reasons which seemed to them adequate determined to ignore it. It is only because this attitude on the part of the appellants has been made plain to me by their own avowal incidentally disclosing that they were fully conscious of its consequences to themselves upon this application that I concur in the view that this appeal should be dismissed.

It appears to me however to be important to take note of the procedure which in this case has been adopted by the respondents. If it were to be supposed that it has been recognized by this Court as in itself appropriate or sufficient it might create a precedent pregnant, as I think, with evil. I take leave therefore to deal shortly with the whole case.

The original duty to make a rate here was by the London Government Act, 1899, imposed upon the borough council as a council, and it is made quite plain, I think, by s. 11, sub-s. 2, of that statute, that intimation of the precepting authority that the rate is to be made when served upon the town clerk is sufficient notice to the council concerned of its duty in the matter. The obligation to make the rate was, in the first instance, as I think, nothing but a corporate obligation of the borough council, and that obligation so thrown upon the council was none the less imperative that it was purely ministerial, and that the rate the council is required by the statute to make is one for which neither in its corporate capacity nor otherwise is the council in any sense responsible. The precepts here were duly served and they were not complied with for reasons of which at the moment I need say nothing, except that they furnish no kind of legal justification for the council's action. Upon that non-compliance proceedings were instituted; and again, these proceedings in the first instance, were instituted against the council, and against the council only. The council alone and as a council was heard to show cause against the rule nisi for a mandamus, and the arguments which were addressed to the King's Bench Division on that occasion and subsequently to the Court of Appeal, were, as Mr. Slesser has told us, arguments directed

to what I may call the corporate responsibility of the council, and to nothing else. And here with reference to Mr. Tindal Atkinson's point that while this council is a corporation, it is a corporation with a difference, I am bound to say I cannot agree with him. This council is none the less a corporation because its corporators being all of them necessarily members of its governing body they may have an individual responsibility for corporate acts which is not necessarily shared by the corporators as such in corporations otherwise constituted. In my judgment this council is a corporation in the fullest sense of the word: it has a corporate responsibility like any other corporation, and up to this point in the narrative it was the corporate responsibility of the council and that only which was sought to be invoked both by the precepts and by the proceedings to enforce compliance with them. For some reason however quite unexplained, the writ of mandamus, against the issue of which the council alone was heard or summoned to show cause, was directed to the council "and every of you" as if the expression "the Poplar Borough Council" was the equivalent of the expression "the Poplar Borough Councillors," and again when we come to the order nisi for the issue of a writ of attachment which followed the non-compliance with the writ of mandamus we find that there is introduced into that order after the words "the said council" the further words "and every of them." Now while I agree with Mr. Macmorran that the regularity of the writ of mandamus is not in question on this appeal and while I doubt not that the words "and every of them" in the order nisi have their source in the words "and every of you" inserted in that writ, I should if I had thought the insertion of these words in the order nisi had prejudiced the appellants in any way, have experienced more difficulty than I do in reaching the conclusion on this appeal at which I have arrived. But in my view while these words do not help the prosecutors they do not, I think, hurt them, if it be the fact that with these words or without these words in the order they have since taken the proper steps to make the individual appellant corporators amenable or to preclude

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them from saying that they are not amenable for the disobedience by their corporation of the original order of the Court. I desire however to say quite definitely that the inclusion of such words as these, or any similarly vague words either in the writ or in the order nisi is, I think, quite insufficient of itself to found subsequent punitive proceedings against particular individuals. Something very much more direct is required before such a foundation can be laid. Mr. Macmorran although he was unable to find any authority in support of his proposition that proceedings in attachment against individuals might follow a writ in which the reference to them was as remote as that which is found in the present case contended, notwithstanding such absence of authority for the view that these words were sufficient, if I may use the expression, to regularise the subsequent proceedings against the appellants. I beg leave to reject that contention. We are not justified, as it seems to me, in matters concerning the liberty of the subject unless imperious authority constrains us to deprive the subject sought to be attached by the King's Bench Division of the well authenticated protection thrown round him in proceedings for attachment in other Divisions of the High Court; and to my mind if it is to be held that the procedure with reference to attachment following upon disobedience to a rule of this kind is in a vital matter like this to be less favourable to the respondent than it is elsewhere that variance must be shown to rest on clear authority not here forthcoming.

What then is the established practice in this matter in proceedings analogous to those with which we are now concerned? Take an order of the Court that certain publications, let us say, shall not be made, and a subsequent application to commit for breach of that order a party who was not before the Court when it was made. In such a case it is incumbent upon the person who seeks to have such a respondent committed to do one of two things—possibly to do both: first, in the application he makes to commit he should add the name of the new respondent to the proceedings, and failing that (and it may be that in all cases this requirement is not

obligatory) it is essential that in the body of the application for committal the name of the respondent should be inserted, and the grounds on which committal is asked for should be set forth. And if committal differs from attachment, as I agree that in many respects it does, there is in this respect no difference between the two forms of application. This is, I think, sufficiently shown by the case of *McKeown* v. *Joint Stock Institute* (1) in which it was sought to attach the secretary and sole director of a company for failure to obey an order which had been made against the company alone. In that case will be seen from the notice of motion set forth in the report the manner in which it was brought home to the respondents that proceedings were being taken against them. And to my mind common fairness demands that such safeguards devised as they have been for the protection of the subject in connection with this special procedure shall invariably be provided: and in connection with any particular procedure aiming at a like result to the respondent, if it is not shown by authority that such safeguards may be dispensed with, I am prepared to hold that they must be made forthcoming.

Now in the present case apart from these very vague and general words in the writ of mandamus there is no reference to individuals anywhere; and no individuals, as I have said, were either heard or summoned to show cause against the issue of that writ. Again, when you come to the order nisi for attachment the terms of which have been referred to by my Lord, that order is even from the present point of view more unfortunate, because, while it plainly gives an opportunity to the defendant council properly so called to show cause against it, it does not in terms give any such opportunity to any one else, so that the form of the order, as I construe it, indicates that the only respondent to be heard in opposition to it will be the defendant council, and none other. In these circumstances had there been no appearance on the subsequent hearing by the individual appellants now attached by the order of the King's Bench Division, and if no affidavit

(1) [1899] 1 Ch. 671.

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had been made by any of the persons who have been in fact attached by the same order, my opinion would have been that none of these could be attached at all, and that the proceedings had as against them been characterised by such irregularity as to be abortive. I take the opportunity of saying all this now, because I do hope that in future cases of attachment against individuals for disobedience of an order to which they were not parties, greater care will be taken to let them know in terms not to be misunderstood that it is against them that the proceedings are directed.

But it is said that if this rule on which I have ventured to insist is to be of universal application, persons in the position of the prosecutors here will be placed in great difficulty. I do not myself think so. It appears to me that all difficulty vanishes so soon as it is grappled with. Its solution is, I think, to be found in the observations of Lord Denman in *Reg.* v. *Ledgard* (1): "If the town council have decided not to obey the writ, that might be prima facie evidence on a motion against all of them." And that, to my mind, is the key to the whole matter. There has been an order made against the borough council; it has been disobeyed: it follows, prima facie, that every member of the borough council is a party to the disobedience, and in subsequent proceedings against him it is enough to prove that the order has in fact been disobeyed, and that the respondent is a member of the council and then leave him to exculpate himself by direct evidence if he can. If he fails so to exculpate himself he is held by the Court to be guilty of the contempt which has already been proved against the corporation. Where however that course is taken the respondents proceeded against ought to be all and not some of the members only of the council in question, because when a prosecutor is attempting to proceed individually against members of a corporation such as this, but is not proposing to make any definite charge against any one of them over and above another, he ought, I think, to proceed against all, otherwise he would be given an opportunity of picking and choosing, which in many a case might be

(1) 1 Q. B. 616, 619.

productive of very grave abuse. He need not however take this course. If he does not desire to rely upon the prima facie responsibility of every member of the council, but does desire to make a case against some particular member or members, it is open to him to do so, naming those particular members only as respondents and making against them the special and particular case on which he desires to rely. In that way the whole ground is covered : in the first alternative the prosecutor proceeds against all and leaves each to exculpate himself, if he can ; in the second he proceeds against selected individual members, making against each a definite case of disobedience to the order. But in both cases it is obligatory on the prosecutor to give each respondent the fullest notice that as against him an application for committal or attachment is being made.

Now in the present case there is, I think, only one question. Have the appellants really suffered from any of the irregularities to which I have called attention ? On a survey of all the facts of the case I have arrived at the conclusion that they have not. By their speeches in the King's Bench Division and by their affidavit they have shown to my satisfaction that irregular as the proceedings against them have been, the appellants have been as fully aware that they were really directed against themselves as if they had been in every sense named as responsible. All irregularity was, I think, waived by them in the Court below in circumstances which show the waiver to have been deliberate.

Now the contempt so brought home to the appellants, regarded as we must alone regard it, taking no account of outside conditions at all, is, I think, a very glaring and flagrant one. It is a reasoned and deliberate flouting of the Court's order. That is to say, it is a disobedience to the law of the land as declared by the King's Courts set up to declare it ; it has moreover been committed by persons exercising public functions regardless of their duty faithfully to discharge them. They are by law left with no discretion as to their action in this matter ; the responsibility for this rate that they were directed but have refused to levy is not theirs. One of the rates in question is directed to be levied by the London

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County Council, a body itself composed of its proper proportion of Poplar representatives and in other respects as democratic and representative as the Poplar council itself. If the rate directed be excessive in its amount, or burdensome in its incidence on Poplar, that is a justification for an alteration in the law, but it is no justification for disobedience to the law before it is altered. If the appellants will not carry out the duties they have undertaken by accepting election to this body, it is their duty to make way for others who will. Deliberate disobedience to this order cannot, in my judgment, be overlooked or excused.

I hope however that it is not too late for the appellants to see that in the attitude that they have taken up in relation to this rate they have fallen into error. It is no great thing that is required of them under the order they have disobeyed: they are not required to do anything impossible and their duty is purely ministerial. I cannot help thinking that the reluctance which they feel in making this rate is because temporarily they have unduly magnified this subordinate office of theirs, and in a sphere in which it is their duty to obey they have arrogated to themselves the right to rule. I most sincerely hope (for I do not doubt their soundness of heart, although I am more sceptical as to the soundness of their judgment) that they will be brought to realise that it is not by disobedience to duly constituted authority that they, as members of a public body, will so impress their views on a sufficient number of their fellow subjects as to attain (by an alteration of the law) the end they have in view.

I therefore think that the orders appealed from with the modifications already indicated must stand and that these appeals should be dismissed.

Appeals of the defendant council allowed.
Appeals of the individual members dismissed.

Solicitors for the Poplar Borough Council and the individual members: *Scott Duckers & Thompson.*

Solicitor for London County Council: *D. P. Andrews.*

Solicitors for Metropolitan Asylums Board: *Williams & James.*

W. I. C.

UNDERWOOD LIMITED *v.* BURGH CASTLE BRICK AND CEMENT SYNDICATE.

1921
May 30.

Contract—Sale of Goods—Sale of Trade Fixture—Delivery free on Rail—Passing of Property—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 18, *rule* 2.

The plaintiffs agreed to sell to the defendants a condensing engine to be delivered free on rail. At that time the engine was affixed to the soil and was a trade fixture on the plaintiff's leasehold premises. The plaintiffs detached the engine, but in loading it up for delivery it was so badly injured by an accident that the defendants refused to accept it:—

Held, that as the defendants intended to buy a chattel and as in order to make it a chattel it had first to be severed from the soil, the property did not pass until it had been severed and delivered under the contract, and, accordingly, that the property therein had not passed to the defendants at the time of the accident.

TRIAL of an action before Rowlatt J.

The plaintiffs on February 19, 1920, agreed to sell to the defendants a horizontal tandem condensing engine to be delivered free on rail in London. On the above date the engine was on the sellers', the plaintiffs', leasehold premises in Ferry Street, Millwall, as a trade fixture, and would have to be detached before it could be sent to the defendants. On April 24, 1920, written instructions were sent to the plaintiffs by the defendants to have the engine sent to Yarmouth. Certain small parts were sent on, and no question arose as to these. But on August 6, 1920, while being loaded on to a railway truck the engine was accidentally injured, the bedplate being broken, and the defendants, after inspection, refused to accept it. By their defence the defendants alleged (inter alia) that the property in the engine had not at the date of the accident passed to them and, alternatively, if it had, that they were entitled to reject by reason of the plaintiffs' failure to deliver.

Alexander Neilson K.C. and *Doughty* for the plaintiffs. The property had passed to the defendants at the time of the accident, and it was therefore at their risk. No time was expressed in the contract for the passing of the property,

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therefore the intention must be ascertained under the rules of the Sale of Goods Act, 1893. By r. 1 of s. 18 on an unconditional contract for the sale of specific goods in a deliverable state the intention is that the property passes when the contract is made. Rule 2, which enacts that where the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer notified thereof, does not apply, because putting in a deliverable state means that something has to be done to the goods themselves: *Acraman* v. *Morrice*. (1) Here nothing had to be done to the engine itself.

Holman Gregory K.C. and *Jowitt* for the defendants. The property would not pass until the engine was delivered on rail. Something had to be done to it for the purpose of putting it in a deliverable state within the meaning of r. 2—namely, detaching it and removing it. It was not a chattel at the time the contract was made, but a fixture and therefore part of the freehold.

Neilson K.C. in reply. As a tenant's fixture it could be severed at any time and become a chattel in a deliverable state.

ROWLATT J. having stated the facts, continued: This case raises an important point under the Sale of Goods Act, 1893. This turns on the question whether the property in the engine had passed to the defendants at the time when the accident happened when the engine was being loaded. This engine weighed some thirty tons and was at the time when it was inspected by the defendants affixed to a bed of concrete by means of Lewis bolts and screwed down. By reason of its weight it had sunk into the concrete and become closely united with it, so that the operation of removing it not only involved unfastening it but taking it to pieces.

The sale was that of a specific chattel to be delivered by the plaintiffs, but the fact that it was to be delivered by them is not the test whether the property passed. The test is

(1) (1849) 8 C. B. 449.

whether anything remained to be done to the engine by the sellers to put it into a deliverable state; and by that I understand a state in which the thing will be the article contracted for by the buyer; I do not mean deliverable in the sense that it is properly packed or anything of that kind. It must have everything done to it that the sellers had to do to it as an article. I do not think therefore that the fact by itself that the sellers had to take the engine to pieces would postpone the time when the property passed. Many chattels have to be taken to pieces before they can be delivered—e.g. a sideboard or a billiard table; nevertheless the property in these passes on the sale and is not postponed until the article is actually taken to pieces and delivered. I do not, therefore, lay any stress on the fact of the engine having to be taken to pieces. I think the important point is that the parties were dealing with an article which was a fixture to the premises, and that is different from the case of a loose chattel. The buyers' intention was to buy an article which would be a loose chattel when the processes of detaching and dismantling it were completed, and to convert it into a loose chattel these processes had first to be performed. The case of a tenant's fixtures seems an analogous case. It seems a safe rule to adopt that if a fixture has to be detached so as to make it a chattel again, the act of detaching has to be done before the chattel can be deliverable. The same result is arrived at if the matter be looked at a little more technically. This fixture was not personal property any more than are tenant's fixtures, but was part of the freehold, and what was sold was not personal property but a part of the realty which the sellers had a right to detach and convert into personal property. The law was explained by Cockburn C.J. in *Lee* v. *Gaskell* where he said (1): "Fixtures, although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or any one else as goods and chattels, because they are not severed from the freehold so as to become goods and chattels. All you can do is to bargain

(1) (1876) 1 Q. B. D. 700, 702.

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for the sale of them as fixtures, which are subject to the right of the tenant to remove them." In the present case the plaintiffs did not sell their right to sever, but were to sever the fixture themselves, and when they had done so, and so produced the chattel, they were to deliver it. That was the contract if the matter is analysed. The plaintiffs contended that as between the parties the intention was that the property should pass at the time of the contract and that s. 17 of the Sale of Goods Act, 1893, applied. The fallacy of that argument seems to be that it assumes that the sellers had the property in the engine at the time when the contract was made. They had not, although it is true that they had rights which reduced the rights of property of the freeholder in whom the property was to a vanishing quantity. If the property had been mortgaged it would have been no answer to the mortgagees' claim to say that in the Sale of Goods Act, 1893, there is a provision that as between buyer and seller fixtures are goods and chattels. That could not affect the property of the freeholder.

For these reasons I think that the property in this engine did not pass to the defendants at the time when the contract was made, and there must be judgment for them.

Judgment for defendants.

Solicitors for plaintiffs: *Hyman Isaacs, Lewis & Mills.*

Solicitors for defendants: *Smith & Hudson, for Wiltshire, Sons & Jordan, Great Yarmouth.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1921
July 11, 12, 25, 28.

ELLIOTT STEAM TUG COMPANY, LIMITED *v.* THE SHIPPING CONTROLLER.

Emergency Legislation—Ship—Charterparty—Requisition by Admiralty—Compensation—Claim by Charterers—Direct Loss—Interference with Business—Injury to Ship—Action by Charterers—Indemnity Act, 1920 (10 & 11 *Geo.* 5, *c.* 48), *s.* 2, *sub-ss.* 1 (*b*), 2 (*iii.*) (*b*); *Schedule, Part II.*

By s. 2, sub-s. 1 (*b*), of the Indemnity Act, 1920, any person, not being the owner of a ship, who has "incurred or sustained any direct loss or damage by reason of interference with his . . . . business . . . . through the exercise . . . . during the war of any . . . . power under any enactment relating to the defence of the realm . . . . shall be entitled to payment or compensation in respect of such loss or damage."

By sub-s. 2 (iii.) (*b*), if the claimant would apart from the Act have no legal right to compensation, the compensation is to be assessed according to the principles set forth in Part II. of the Schedule to the Act.

A towage and salvage company hired the use of a tug for the purposes of their business by a charterparty which entitled them to the services of the tug for as long as they pleased and enabled them to terminate the hiring by a fourteen days' notice. During the currency of the charterparty the tug was requisitioned by the Admiralty:—

Held, by Bankes and Warrington L.JJ. (Scrutton L.J. dissenting), that the loss of the average net earnings of the tug during the period of the requisition was a "direct loss or damage" by reason of interference with the charterers' business within the meaning of s. 2, sub-s. 1 (*b*), of the Act, and that they were entitled to compensation:—

Held, per Curiam, that the charterers would apart from the Act have no legal right to compensation.

Held, therefore, per Bankes and Warrington L.JJ., that in accordance with s. 2, sub-s. 2 (iii.) (*b*), compensation must be assessed as directed by Part II. of the Schedule to the Act.

APPEAL from the decision of the tribunal constituted by s. 2 of the Indemnity Act, 1920.

The Elliott Steam Tug Co. claimed compensation under s. 2, sub-s. 1 (*b*) and sub-s. 2 (iii.) (*b*) of that Act and Part II. of the Schedule to the Act (1) for direct loss or damage by reason of interference with their property or business through the exercise during the war of powers conferred by the Defence of the Realm (Consolidation) Act, 1914.

The claimants owned and used tugs for the purpose of

(1) These sections and Part II. of the Schedule are set out in the judgment of Warrington L.J.

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towage and salvage. They had chartered the tug *Frank* from the owners thereof by a charterparty dated November 2, 1914, which entitled the claimants to the services of the tug for as long as they pleased until they should give the owners fourteen days' notice in writing to determine the charterparty. The hire was at the rate of 155*l.* per calendar month.

On May 19, 1917, the *Frank* was requisitioned by the Admiralty and was retained by them under the requisition until November, 1919. At first the Admiralty, who dealt only with the owners, paid them 5*l.* 10*s.* a day for the use of the tug and this sum the owners handed over to the claimants. Afterwards the Admiralty undertook the insurance and maintenance of the tug, and then they paid the owners 1*l.* 4*s.* a day for the use of the tug and the owners paid this sum and no more to the claimants.

The claimants did not determine the charterparty being on the whole satisfied with its terms; but they claimed compensation for direct loss by reason of interference with their business through the requisition of the Admiralty.

They presented their claim under two heads: (1.) the amount of hire which they continued liable under the charterparty to pay to the owners of the tug throughout the period of the requisition; and (2.) the loss of profit which they would have made during that period but for the requisition after giving credit for sums paid by the Admiralty to the owners, and by the owners to them.

The tribunal allowed the claimants one month's hire of the tug under the first head of claim. No question arises in this appeal upon that head.

Upon the second head the tribunal took the view that when the tug was requisitioned the claimants ought, after a reasonable time in which to consider their position, to have given fourteen days' notice to determine the charterparty, so as to minimize their loss, and they allowed the claimants the amount of their loss of profit during thirty days. In answer to the claimants' contention that they were obliged to continue the charterparty, because they could not find a substitute for the *Frank* owing to the existence of a state of war, the

tribunal held that to allow them further compensation on that ground would contravene the principles laid down in Part II. of the Schedule of the Act.

The claimants appealed on the ground that the tribunal was wrong in holding that to award the claimants further compensation than the amount above mentioned—i.e., the loss of profits for thirty days—would be to contravene the principles laid down in Part II. of the Schedule to the Indemnity Act, 1920.

There was a cross-appeal by the Shipping Controller on the ground that there were no facts from which the tribunal could infer that the interference with the claimants' business by reason of the requisition caused them any loss of profit. (1)

Stuart Bevan K.C. and *van den Berg* for the appellants.

Sir Gordon Hewart A.-G., *MacKinnon K.C.* and *Ricketts* for the respondent.

Cur. adv. vult.

July 28. The following written judgments were delivered :—

BANKES L.J. This is an appeal from a decision of the tribunal set up by the Indemnity Act, 1920. By s. 2, sub-s. 1, an appeal is given upon any point of law to a party aggrieved by any direction or determination of the tribunal. By the recent Order LV.B of the Rules of the Supreme Court rules are provided regulating appeals from the tribunal. Rule 40 provides that the notice of motion to this Court shall state the point or points of law by the direction or determination on which the appellant feels aggrieved. The point of law raised by the appellants in this appeal is stated in the notice of appeal as follows : "And further take notice that the points of law by the determination of which the claimants feel aggrieved are that the Court was wrong in holding that to award the claimants further compensation than the amount above mentioned would be to contravene the principles laid down in Part II. of the Schedule to the Indemnity Act, 1920,

(1) The material parts of the notice and cross-notice of appeal are set out in the judgment of Warrington L.J.

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and furthermore the claimants will contend that upon the evidence called and the facts so found, they are entitled to the compensation claimed as aforesaid."

The facts which gave rise to the appellants' claim for compensation as found by the tribunal are shortly as follows. The appellants carry on business as tug owners. In November, 1914, they chartered the tug *Frank* from her owners upon terms which entitled the appellants to retain her as long as they pleased, with a right to determine the hiring on fourteen days' notice in writing. The hire was at the rate of 155*l.* per calendar month. On May 19, 1917, the tug was requisitioned by the Admiralty, and she was retained under the requisition until the month of November, 1919. The appellants did not determine the charterparty, because having regard to the favourable terms on which they had acquired the tug, they were anxious to keep her at their disposal when she was released from requisition. The claim put forward by the appellants for compensation represented what they claimed to be the direct loss to them arising from the requisitioning of the tug. It was made up under two heads, (1.) the amount of hire which they continued liable to pay to the owners during the whole time that the tug was under requisition; (2.) the loss of the profit which they would have made during that period by the use of the tug. They were willing to give credit for all sums which the Admiralty had paid to the owners, and which the owners had passed on to them. The view taken by the tribunal with regard to the first head of claim was that with the view of minimizing the damages resulting from the requisitioning of the tug it was the appellants' duty to have given the fourteen days' notice terminating the charter, and had this been done the obligation to pay any further hire would have ceased. The tribunal however considered that the appellants should be allowed a reasonable time within which to decide what course to take, and as a result they allowed one month to cover both the consideration period and the notice period, and gave the appellants their full claim under both heads of damage for that month. This decision was challenged by

the appellants, as a matter of law, upon the ground that there was no evidence to support the finding of the tribunal that it was a reasonable course to take, and consequently their duty to put an end to the charterparty in order to minimize the damage. This Court held that the point was not raised by the notice of appeal, and would not allow it to be proceeded with. This disposes of any question of damage in reference to the hire paid by the appellants under the charter during the period of requisition.

There remains the claim for loss of profit, or expressed more accurately the loss of what would be the average and ordinary net earnings of the tug during the period of requisition. This claim cannot be disposed of upon the same grounds as those on which the claim for the hire was disposed of. If the appellants' duty was to put an end to the charter for the purpose of minimizing damages, and they had in fact done so, it would not have been a voluntary act, and would have been done merely for the purpose of minimizing the damages which resulted from the requisitioning of the tug and would have left the other branch of the claim for damages untouched. Whether the appellants had any right to those damages depends upon the construction of the Indemnity Act, because apart from that Act it is I think clear that they could not have had any legal right to damages. The Act by s. 2, sub-s. 1, provides that any of the persons indicated in the section who has "incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage; and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned." By awarding the appellants damages limited to the period of one month the tribunal have found (as I think upon the evidence they were entitled to find) that the business of the

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appellants had been interfered with by the requisitioning of the tug, and that the appellants had sustained direct loss thereby. By their cross notice of appeal the respondents complain of the inference drawn by the tribunal, that the interference with the appellants' business caused them any direct loss. In my opinion the decision of the tribunal upon this point was correct, and in accordance with the authorities : see *The Argentino.* (1) The loss of what the tug might reasonably and fairly be expected to earn for the appellants had she not been requisitioned is in my opinion direct loss within the meaning of the sub-section which I have just quoted. It was urged upon the Court by the respondents' counsel that it had never been the practice of the Defence of the Realm Losses Commission to award any compensation for loss of profits, and that, as the tribunal was directed by s. 2, sub-s. 2, iii. (*b*), of the Act to assess compensation in accordance with the principles on which that Commission acted, the tribunal could not award profits. Whether this was the practice of the Commission I do not know, but of this I am sure, that since the passing of the Indemnity Act, 1920, compensation must be assessed by the tribunal set up by that Act in accordance with the directions of that Act, and not otherwise ; and I am confident that the tribunal must be dealing with claims upon that footing. It does not follow that because a person proves a direct loss by reason of interference with his property he is entitled to payment or compensation, because the principles upon which payment or compensation are to be assessed are laid down by the Act. Those principles are set out in the Schedule to the Act, and they appear to have been framed with the intention of awarding compensation to individuals who suffered losses over and above what the community in general suffered owing to the war, and to exclude compensation for any special loss or any loss of special profits due to the war, or for any losses arising solely out of the existence of a state of war. It was no doubt difficult to select a form of words which would exactly and clearly convey the intention of the Legislature, and I do not propose

(1) (1888) 13 P. D. 191 ; (1889) 14 App. Cas. 519.

to attempt any definition of what the various expressions in the Schedule include. In the present case the tribunal have excluded the bulk of the appellants' claim for loss of profit. If they did so on the ground that the appellants failed to prove a direct loss, their decision was not in my opinion correct in law. I am not satisfied that they did so decide, or that they so intended to decide. Indeed their decision awarding some damages indicates the contrary. The written judgment of the tribunal concludes in this way: "It was contended that the impracticability of hiring a substitute tug, owing to the existence of a state of war, combined with the requisition, forced the claimants' decision and so caused the further loss; but it appears to us that to compensate the claimants for such further loss on that ground would be to contravene the principles laid down for our guidance in Part II. of the Schedule to the Indemnity Act." If by this the tribunal intended to convey that though the loss proved by the appellants was a direct loss it nevertheless was a loss excluded by the express language of Part II. of the Schedule, and therefore could not be taken into account by the tribunal, we have not at present the materials upon which we can decide the point of law raised by the appellants. This Court cannot decide questions of fact. The case therefore must be remitted to the tribunal for them to take such action (if any) as they may consider desirable and to report to the Court, if they so desire, any further findings of fact upon which this Court can proceed in dealing with the question of law submitted to it. The appeal must be adjourned. The cross-appeal fails and must be dismissed with costs.

WARRINGTON L.J. This is an appeal by claimants under the Indemnity Act, 1920, from the determination by the tribunal set up under that Act of the amount due to them for compensation.

By s. 2, sub-s. 1 (i.), of the Act the right to appeal is strictly limited to any direction or determination of the tribunal on any point of law, and by r. 40 of Order LV.B in the Rules of the Supreme Court, 1921, it is provided that the notice of

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motion, i.e., the notice of appeal, shall state the point or points of law by the decision or determination on which the appellant feels aggrieved. The jurisdiction of this Court is therefore strictly limited and we must be careful not to pass the limits there laid down.

The claimants were under a charterparty dated November 2, 1914, the charterers of a steam tug *Frank* for a period which was practically so long as they pleased unless previously determined by the charterers by a fourteen-days' notice. The tug was used by the claimants for their towage and salvage work from which they derived profits. She was on May 19, 1917, requisitioned by the Admiralty. The claimants claimed compensation under two heads: (1.) loss of profit from the use of the tug in their business of which use they had been deprived during the period of requisition; and (2.) the charter rate of hire paid by them to the owners so far as it had not been repaid out of the hire paid by the Government. The tribunal have awarded compensation under both heads for the amounts claimed, but for thirty days only. The claimants seek to have the limit of thirty days removed so far as concerns the loss of profits. The respondents on the other hand contend that nothing should have been awarded for loss of profits. I have stated the nature of the case in general terms only, but in terms which seem to me to be sufficient to explain what follows. The jurisdiction of the tribunal and the right of the claimants to compensation depend in my opinion on the Indemnity Act, 1920. By s. 1 of that Act the right to institute legal proceedings in respect of acts done in good faith by officers of the Crown during the war is speaking generally taken away, but by s. 2 a right to compensation is given. That section by sub-s. 1 provides that a person, (*a*) being the owner of a ship which has been requisitioned shall be entitled to payment or compensation as therein mentioned, "(*b*) who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any

power under any enactment relating to the defence of the realm, or any regulation or order made or purporting to be made thereunder, shall be entitled to payment or compensation in respect of such loss or damage ; and such payment or compensation shall be assessed on the principles and by the tribunal hereinafter mentioned, and the decision of that tribunal shall be final." This is followed by two provisions, one giving the limited right of appeal above referred to, the other being immaterial. Sub-s. 2 provides that "the payment or compensation shall be assessed in accordance with the following principles" : Of these (i.) and (ii.) are not applicable to the present case. (iii.) is as follows : "(*a*) If the claimant would, apart from this Act, have had a legal right to compensation, the tribunal shall give effect to that right, but in assessing the compensation shall have regard to the amount of the compensation to which, apart from this Act, the claimant would have been legally entitled, and to the existence of a state of war and to all other circumstances relevant to a just assessment of compensation : Provided that this sub-section shall not give any right to payment or compensation for indirect loss. (*b*) If the claimant would not have had any such legal right, the compensation shall be assessed in accordance with the principles upon which the Commission appointed by His Majesty under Commissions dated March 31, 1915, and December 18, 1918, (commonly known as the Defence of the Realm Losses Commission), has hitherto acted in cases where no special provision is made as to the assessment of compensation, which principles are set forth in Part II. of the Schedule to this Act."

In my opinion the claimants in the present case come under sub-clause (*b*). As charterers they had no property in the ship nor had they the possession thereof and they could not at common law have maintained an action against the officers of the Crown who took possession of the ship. Accordingly that part of the Schedule which regulates in their case the assessment of compensation is Part II., which is in the following terms : "Principles on which the Defence

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of the Realm Losses Commission has hitherto acted. The compensation to be awarded shall be assessed by taking into account only the direct loss and damage suffered by the claimant by reason of direct and particular interference with his property or business, and nothing shall be included in respect of any loss or damage due to or arising through the enforcement of any order or regulation of general or local application, or in respect of any loss or damage due simply and solely to the existence of a state of war, or to the general conditions prevailing in the locality, or to action taken upon grounds arising out of the conduct of the claimant himself rendering it necessary for public security that his legal rights should be infringed, or in respect of loss of mere pleasure or amenity." The tribunal arrived at the following conclusions: (1.) that the business of the claimants as charterers was interfered with by the requisition; (2.) that the requisition interfered with the claimants' business so as to cause directly some loss of profit and some loss of charter hire; (3.) that to minimize the loss they ought to have given the fourteen days' notice to determine the charter but were entitled to a reasonable time, fixed by the tribunal at thirty days, to consider their position, and accordingly they allowed the claim under both heads for thirty days. The judgment concludes with the following passage: "The further payments of charter hire and the further loss of profits was not caused directly or even indirectly by the requisition. As Mr. Page candidly stated, the claimants themselves in their own business interests after consultation and advice decided to keep the charter on foot for so long a period as the requisition lasted. This decision and not the requisition caused the further loss. It was contended that the impracticability of hiring a substitute tug, owing to the existence of a state of war, combined with the requisition, forced the claimants' decision and so caused the further loss; but it appears to us that to compensate the claimants for such further loss on that ground would be to contravene the principles laid down for our guidance in Part II. of the Schedule to the Indemnity Act." I now turn to the appellants' notice of appeal. After

stating that he intends to appeal he defines his point in these terms: "And further take notice that the points of law by the determination of which the claimants feel aggrieved are that the Court was wrong in holding that to award the claimants further compensation than the amount above mentioned" —that is loss during the thirty days—"would be to contravene the principles laid down in Part II. of the Schedule to the Indemnity Act, 1920, and furthermore the claimants will contend that upon evidence called and the facts so found, they are entitled to the compensation claimed as aforesaid." The last contention seems to me to raise really no point of law at all. This is not drawn with the precision which in proceedings such as the present ought I think to be observed, but I think it means that there was nothing in the Schedule to justify the limitation to the thirty days.

The respondent's cross notice is as follows: "And further take notice that the point of law by the direction of determination on which the respondent feels aggrieved is the inference drawn by the Court that the interference with the claimants' business by reason of the requisition was such as to cause directly some loss of profit and some loss of charter hire and the decision of the Court that it was competent to the Court to draw such an inference from the facts proved."

I will deal first with the cross-appeal. This in my opinion fails. The question turns on the construction of the statute. I will assume that at common law the charterers could have obtained no compensation for interference with mere contractual rights, but the statute has, in my opinion, without reference to the question whether the claimants had rights at law, given compensation to any person who has incurred or sustained any direct loss or damage by reason of interference with his business. The claimants' business was that of employing the *Frank* and other tugs in towage and salvage work. They proved that profits were derived by them by the employment of the *Frank* and they lost these profits by being deprived of the *Frank*, they not being able, as they proved, to obtain on reasonable terms another tug in her

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place. I think the tribunal were justified in concluding that some loss of profit was direct loss sustained by reason of interference with business. Were the tribunal justified in confining the loss to the thirty days? As regards the minimizing the loss by determining the charter, with deference to the tribunal, the determination of the charter, though it would have rendered them no longer liable to pay hire and so have reduced their loss in that respect, would have left the loss of profit resulting from their loss of the tug unaffected, and I think the tribunal were wrong in law in limiting on this ground the period for which loss of profit was allowed. But it is open to argument that the loss after the thirty days resulting from inability to obtain another tug was not suffered by reason of "direct and particular interference" with the claimants' business by the requisition of the *Frank* but by reason of general measures taken by the Government in consequence of the existence of a state of war, and was thus due "simply and solely" to the existence of that state of war or to "general conditions prevailing in the locality." I express no opinion on the validity of this argument, for we do not know from the judgment with any certainty the view taken by the tribunal. The concluding passage of the judgment seems to indicate that they took some such view as I have suggested, but I think they ought to be requested if they think fit to make further findings of fact or to express their views in terms on the construction of Part II. of the Schedule. The matter should be referred back to them for this purpose.

The cross-appeal should in my opinion be dismissed with costs.

SCRUTTON L.J. This is an appeal under s. 2, sub-s. 1 (i.), of the Indemnity Act, 1920, from the decision of the Defence of the Realm Losses Commission upon a claim by the Elliott Steam Tug Co., charterers of the tug *Frank* owned by Charles Duncan & Co., for compensation for damage done to their business by the requisition of the tug by the Admiralty on May 19, 1917. Before the requisition of the tug the charterers

were making a profit of 5*l.* 11*s.* 4*d.* per day (not including days when the tug was not working) after paying the owners 5*l.* 3*s.* 4*d.* a day. In other words they were making a gross profit of 10*l.* 14*s.* 8*d.* a day, a net profit of 5*l.* 11*s.* 4*d.* a day. The Admiralty, who only deal with owners, at first paid the owners 5*l.* 10*s.* a day, which the owners ultimately handed over to the charterers. The charterers had continued to pay 5*l.* 3*s.* 4*d.* a day to the owners for their charter was renewable at charterers' option, and the charterers desired to preserve their rights over the tug, after the requisition ceased. These rights indeed were so valuable that the owners ultimately paid the charterers 2000*l.* to cancel the charter. In the second stage of the requisition the Admiralty took over the maintenance of the tug, and only paid the owners 1*l.* 4*s.* a day, which they paid to the charterers. At this stage the charterers, who were paying the owners 5*l.* 3*s.* 4*d.* a day, and only receiving 1*l.* 4*s.* from the Government, were obviously making a heavy loss. The question now is as to the rights of the charterers against the Government.

At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right: see on this point the judgment of Blackburn J. in *Cattle* v. *Stockton Waterworks Co.* (1), where a contractor making a tunnel on K.'s land claimed against a wrongdoer to K.'s land, whose wrong made his contract less profitable, and was held not entitled to recover. It is for this reason that underwriters cannot sue directly a wrongdoer against property they have insured, but must proceed in the name of the assured, as explained by Lord Penzance in *Simpson* v. *Thomson.* (2) It is for this reason also that charterers under a charter not amounting to a demise do not and cannot sue in the Admiralty Court a wrongdoer who has sunk by collision their chartered ship. The same

(1) (1875) L. R. 10 Q. B. 453. (2) (1877) 3 App. Cas. 279, 289.

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principle was applied by Hamilton J. in *Remorquage à Hélice (Société Anonyme)* v. *Bennetts* (1), to prevent the owner of a tug suing the wrongdoer who had sunk his tow, whereby he had lost the benefit of his contract of towage. When the Court of Appeal in *The Okehampton* (2) allowed sub-charterers to sue for the loss of their bill of lading freight through a collision by the defendants' wrongdoing, they did so, I think, because it was proved that the sub-charterers, not the owners, had contracted to carry the goods and had received them and had, therefore, a lien for the freight and sufficient possession as bailees to sue for damages to the goods: see *The Winkfield.* (3) This is a sufficient reason for the decision, as explained by Hamilton L.J. at the beginning of his judgment. I do not think the head-note is accurate in speaking of possessory interest in the ship.

But, secondly, at common law, the shipowner suing a wrongdoer for temporary loss of the ship's services would be entitled at common law to recover the loss of profits during that period as a direct consequence of the wrong. This is explained as regards ships by the judgments of Bowen L.J. and the House of Lords in *The Argentino.* (4) It is indeed every-day practice in injury cases, where the plaintiff is given loss of earnings or profits during the time his injury lasts as the direct consequences of the injury. I used the word "direct," because it is the word preferred after consideration of the alternatives by Lord Sumner in *Weld-Blundell* v. *Stephens.* (5) The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law rightly or wrongly does not recognize him as able to sue for such an injury to his merely contractual rights.

But, thirdly, at common law the owner of a ship while under a duty to act reasonably to reduce damages is under no

(1) [1911] 1 K. B. 243.
(2) [1913] P. 173.
(3) [1902] P. 42.
(4) 13 P. D. 191; 14 App. Cas. 519.
(5) [1920] A. C. 956, 983.

obligation to destroy his own property to reduce the damages payable by the wrongdoer. The leasehold tenant of a house would not be bound to stop paying rent to his superior landlord during the period during which a wrongdoer prevented him using the house, because by so doing he would reduce the damages the wrongdoer had to pay if by so doing he lost the tenancy of the house after the wrong of the tort feasor was repaired, or finished in its effects. It is common practice at common law to recover, (1.) net profits lost; (2.) standing charges which have reasonably to be incurred and which are not made up by profits by reason of the wrongdoer's action. In other words in a case of temporary loss of a chattel, gross profits lost are recovered so far as expenses of earning them reasonably continue; and the reasonableness is from the point of view of the owner of the chattel. If the expenses cease their amount is set off against the gross profit otherwise lost. I mention these second and third points because on neither of them do I agree with the view taken by the Commission during the argument, which was apparently that loss of profits during requisition could not be the direct consequence of the requisition; and that the charterer was obliged to abandon his charter or rather was not entitled to claim the cost of keeping it alive for his benefit after the requisition.

The charterer then has no common law right against a person who deprives him of the opportunity of earning profits by his contractual rights, by taking away the ship in respect of which he had a contract. As a consequence the Board of Arbitration which dealt with registered ships excluded the charterer from claiming for the same reason. They only allowed the owners to claim, and s. 2, sub-s. 1 (*a*), of the Indemnity Act does not apply to the case of a charterer. He does not come under s. 2, sub-s. 2 (iii.) (*a*), for apart from the Act he would have no legal right to compensation. He can only get compensation under the Act if he has sustained any direct loss or damage by reason of interference with his property or business through the exercise of prerogative rights, or powers under any statute for the defence of the

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realm and then only on the principles set out in Part II. of the Schedule to the Act. The Commission appear to have rejected all claim for loss of profits because the charterers were unable to replace the requisitioned tug at any reasonable rates on the ground that it was "loss or damage due simply and solely to the existence of a state of war." In one view all requisitions were due to a state of war, but to adopt this interpretation would be to make the Schedule illusory and meaningless, even as applied to owners. It is difficult to interpret these very vague words, but they may perhaps exclude that part of the profits or value due to war as compared with the pre-war profits or value.

But in my opinion there is a deeper objection to the appellants' claim based on the common law principles already stated, namely, that the charterer cannot get any damages for the loss of his purely contractual rights, whether in property or business. The owner of a ship requisitioned who had been running it for his own account receives an agreed sum from the Admiralty for hire, say 5*l.* a day, and the Admiralty only deals with the owner. Suppose he has chartered his ship, does the amount payable by the Admiralty suddenly rise from 5*l.* a day for the ship run by the owner for himself to 10*l.* a day for the same ship run by the owner for the charterer? It clearly does not, in my opinion, and the reason is that the 5*l.* a day is the full value of all interests in the ship. It is probably much less than the market value of an unrequisitioned ship, but that is because of the agreed Blue Book rates. But it is the full value for the purpose of compensation and the charterer is not entitled to any additional payment. Whether he is entitled to any share of the 5*l.* depends on his contract with the owners; in this case he has had the whole of the gross rate and cannot claim any more; he must settle with the owner his share, if any, of the net rate and its advantages.

This view, which is not the view put forward by the tribunal, excludes the claim of the appellants; there is a cross-appeal against the amount awarded by the tribunal rested on the ground that the loss of profits was not direct

loss. I think it was direct loss if the charterer had a right to claim, and that, therefore, the cross-appeal fails on the point raised.

Appeal adjourned; cross-appeal dismissed.

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Solicitors for appellants: *Thomas Cooper & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

W. H. G.

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Rating—Tithe Rentcharge—Benefices united "for ecclesiastical purposes only"—Separate Incomes under 300l.—"District formed for ecclesiastical purposes by virtue of statutory authority"—Pluralities Act, 1838 (1 & 2 *Vict. c.* 106), *s.* 16—*Tithe Rentcharge* (*Rates*) *Act*, 1899 (62 & 63 *Vict. c.* 17), *s.* 2, *sub-s.* 1 (*b*)—*Ecclesiastical Tithe Rentcharge* (*Rates*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 22), *s.* 1, *sub-ss.* 2, 5.

The incumbent of two benefices which had been united "for ecclesiastical purposes only" by Order in Council under s. 16 of the Pluralities Act, 1838, claimed relief in respect of rates under s. 1, sub-s. 2, of the Ecclesiastical Tithe Rentcharge (Rates) Act, 1920. The income of each benefice separately was under 300*l.*; the combined income was (as the justices found) between 300*l.* and 500*l.* The justices were of opinion that the combined income must be treated as one for the purpose of rating, and made an order for payment of one-half the amount of the rates which would, but for the Act, have been payable by the incumbent:—

Held, by the Divisional Court, that the benefices having been united "for ecclesiastical purposes only" under s. 16 of the Pluralities Act, 1838, the proviso to that section applied; and, further, that such united benefices were not a "district formed for ecclesiastical purposes by virtue of statutory authority" within the meaning of s. 2, sub-s. 1 (*b*), of the Tithe Rentcharge (Rates) Act, 1899; and therefore that the incomes of the two benefices were separately rateable, and that the incumbent was entitled to total relief from rates in respect thereof.

CASE stated by Suffolk justices.

This case was stated on a summons for rates issued by the overseers of the parish of Ashbocking. By an Order in Council dated November 25, 1919, under s. 16 of the Pluralities Act, 1838 (1), the benefices of Ashbocking and

(1) The Pluralities Act, 1838, s. 16, sets out certain formalities after which "it shall be lawful for Her Majesty in Council to make and issue

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Swilland were united into one benefice with cure of souls "for ecclesiastical purposes only." The appellant, the Rev. F. S. Keane, was the incumbent and owner of the tithe rentcharge of the united benefices of Ashbocking and Swilland. The income of each benefice taken separately was less than 300*l.* The combined income of the two benefices was, on the basis of calculation adopted as correct by the justices, above 300*l.* but under 500*l.* The tithe rentcharge was separately assessed to rates for each benefice. The appellant made a statutory declaration in respect of each benefice in the form required by s. 1, sub-s. 2, of the Ecclesiastical Tithe Rentcharge (Rates) Act, 1920 (1), and claimed total relief from rates under that section. The justices held that the incomes of the united benefices must be treated as one income for rating purposes, and made an order for payment of 34*l.* 7*s.*, being one-half the amount which the appellant would have been liable to pay but for the Act.

an order or orders for uniting such benefices . . . . into one benefice, with cure of souls, for ecclesiastical purposes only . . . . provided always that notwithstanding any such union the parishes or places of which such united benefice shall consist shall continue distinct as to all secular rates, taxes, charges, duties, and privileges, and in all other respects except as hereinbefore specified."

(1) The Ecclesiastical Tithe Rentcharge (Rates) Act, 1920, s. 1, sub-s. 2: "Where the owner of tithe rent-charge attached to a benefice, before payment of the amount payable by him in respect of any such rate as aforesaid, produces to the collector of the rate a statutory declaration made by him in a form prescribed by the Minister of Health showing that the total income arising from the benefice . . . . estimated in accordance with the provisions of the Income Tax Acts did not exceed 300*l.*, or if it exceeded that sum, did not exceed 500*l.*, the owner shall be entitled to such relief or abatement in respect of such rate as follows, that is to say, if the total income arising from the benefice did not exceed 300*l.* the owner shall not be liable to any payment in respect of the rate, and if it exceeded that sum, but did not exceed 500*l.* the owner shall be allowed an abatement of one-half of the amount which would otherwise be payable by him in respect of the rate having regard to the preceding provisions: and the amount of any relief or abatement in respect of a rate given by this section shall be deemed to be irrecoverable."

Sub-s. 5: "In this Act the expression 'benefice' has the same meaning as in the Tithe Rent-charge (Rates) Act, 1899. . . . ."

The Tithe Rent-charge (Rates) Act, 1899, s. 2, sub-s. 1 (*b*): "The expression 'benefice' includes . . . . districts formed for ecclesiastical purposes by virtue of statutory authority."

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A. Macmorran K.C. and *E. J. Naldrett* for the appellant. The words "for ecclesiastical purposes only" in s. 16 of the Pluralities Act, 1838, are really in themselves enough to show that the appellant is entitled to succeed. The proviso to that section puts the matter beyond doubt by express enactment.

[They were stopped.]

D. M. Hogg K.C. and *H. du Parcq* for the respondents. The respondents rely upon sub-s. 5 of s. 1 of the Ecclesiastical Tithe Rentcharge (Rates) Act, 1920, which refers to the Tithe Rentcharge (Rates) Act, 1899, for the definition of the term "benefice." In the Act of 1899 "the expression 'benefice' includes . . . . districts formed for ecclesiastical purposes by virtue of statutory authority." These united benefices are such a district, and the proviso to s. 16 of the Pluralities Act, 1838, must be taken to be impliedly repealed so far as is necessary to give effect to the words of the later Acts.

LORD TREVETHIN C.J. This case raises a question as to the proper construction of the Ecclesiastical Tithe Rentcharge (Rates) Act, 1920. That statute gives relief from rates to certain beneficed clergy. It provides that where the total income arising from a benefice shall not exceed 300*l.* the owner of the tithe rentcharge shall not be liable to any payment in respect of the rate, and where it exceeds that sum but does not exceed 500*l.* he shall be allowed an abatement of one-half of the amount which would otherwise be payable by him in respect of the rate. The income of the clergyman here is, upon the facts, undoubtedly within 300*l.*, if he is to be taken as the owner or vicar of the benefice of Ashbocking alone, or of Swilland alone, but if he is to be regarded as the vicar of both, then his income is over that amount. This is a rate levied by the Ashbocking Overseers, and the suggestion made is that because there has been an Order in Council uniting these two parishes for ecclesiastical purposes only they are to be regarded by the Ashbocking Overseers as one benefice for the purposes of the poor rate.

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That seems to me to be contrary to the express words of the statute, under which these two benefices were united for ecclesiastical purposes only, because the Order in Council which unites them is made under the Pluralities Act, 1838, s. 16, and that, after empowering the ecclesiastical authorities to unite (inter alia) benefices for ecclesiastical purposes only, at the end of the section contains the proviso which has been referred to. Then Mr. du Parcq, as I understand, says that though by the Order in Council the union of these two benefices is for ecclesiastical purposes only, the definition clause s. 1, sub-s. 5, of the Ecclesiastical Tithe Rentcharge (Rates) Act, 1920, defines 'benefice' thus: "'Benefice' has the same meaning as in the Tithe Rentcharge (Rates) Act, 1899." That carries one to the Act of 1899 for the definition. That does not say "benefice" shall mean any united benefices, all it says is that "the expression 'benefice' includes all rectories with cure of souls, vicarages, perpetual curacies," and so on, and then the words on which Mr. du Parcq relies: "and districts formed for ecclesiastical purposes by virtue of statutory authority." He says that these two benefices being united for ecclesiastical purposes only become by virtue of that definition a district formed for ecclesiastical purposes by virtue of statutory authority. I do not think that the definition has that effect. First of all it only says that the word "benefice" shall include these various things. No doubt it would have to be construed as a word wide enough to take in each of these different things, but it by no means says that it is to include things which have been joined together for a totally different purpose, and, as my brother Sankey has pointed out during the argument, that expression "districts formed for ecclesiastical purposes by virtue of statutory authority" has a recognized meaning, and the illustrations that he gave of it are in connection with the Church Buildings Acts; there may be other instances, but nowhere is there any authority which shows that wherever the word "benefice" is used it includes benefices united under the Act of 1838. It seems to me that if that had been intended the Act of 1920 would have contained the words "Notwithstanding the

proviso to Section 16 of the Pluralities Act, 1838"; it does not contain any such words, and that being so for this secular purpose of rates these two benefices are still two benefices, and the Ashbocking Overseers are limited to their own parish just as they were before the Order in Council. I think that the appeal succeeds and must be allowed with costs.

SANKEY J. I am of the same opinion, and I think the decision of the justices proceeds upon a misapprehension as to the effect of what happens when two benefices are united under the Pluralities Act, 1838. These two benefices were so united. [His Lordship read the section and proviso.] Under these circumstances one turns to the Ecclesiastical Tithe Rentcharge (Rates) Act of 1920. Sect. 1, sub-s. 2, provides what is to happen where the owner of tithe rentcharge attaching to a benefice desires to escape the charge altogether by reason of the fact of his benefice being under 300*l.*, or partly, by reason of the fact of its being under 500*l.* In this particular case it is said that the income of the two benefices is such that the uniting of the benefices will result in the income of the united benefices only partly escaping liability. That can only, as Mr. du Parcq very fairly observed, be accomplished if the definition clause in sub-s. 5 applies. That provides: "In this Act the expressions 'benefice' and 'owner of tithe rentcharge' and 'tithe rentcharge' have the same meanings as in the Tithe Rentcharge (Rates) Act, 1899." Then he turns to the meaning of "benefice" in the Tithe Rentcharge Act, 1899, and says this is a "district formed for ecclesiastical purposes by virtue of statutory authority." I will not repeat the cogent point made by my Lord with regard to the word "includes," but I desire to point out that it would be a very strange thing if a definition clause of that sort were construed as repealing the express enactment contained at the end of s. 16 of the Pluralities Act, 1838. But the objection to Mr. du Parcq's argument goes far deeper. These words "districts formed for ecclesiastical purposes, by virtue of statutory authority" are well known, and in my

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opinion refer to the various districts which were formed out of old civil parishes by various Acts of Parliament beginning as early as the Church Buildings Act, 1818, and going on to the New Parishes and Church Buildings Amendment Act, 1884. It is an Act of Parliament which formed these districts and in my opinion the words "districts formed for ecclesiastical purposes by virtue of statutory authority" refer to districts formed thereunder, and have really nothing to do with a union of benefices under the Act of 1838. If the words in s. 2, sub-s. 1 (*b*), of the Act of 1899 are looked at, it will be seen that they include every conceivable sort of district, and finally sweep in all these districts, which in my view are districts referred to in the various Church Buildings Acts and New Parishes Acts.

As I have said before I think this decision proceeds on a misapprehension of the meaning of these words, and in my opinion the appeal should succeed.

ACTON J. I agree.

Appeal allowed.

Solicitors for appellant: *Whites & Co., for Greene & Greene, Bury St. Edmunds.*

Solicitors for respondents: *Field, Roscoe & Co., for Aldous & Gotelee, Ipswich.*

J. W. H.

BOYCE *v.* COX.

1921
Oct. 21.

Bastardy—"Single woman"—Marriage of Mother after Birth of Child—Separation Order—Liability of putative Father—Poor Law Amendment Act, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 57—*Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 26—*Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3—*Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 5 (*a*).

An unmarried woman was delivered of a child. The putative father made payments for its maintenance within twelve months. Subsequently the mother married another man, who maintained the illegitimate child till the mother obtained a separation order on the ground of his cruelty. No provision was made in the order for maintenance of the illegitimate child:—

Held, that the mother was a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, the effect of a separation order being to confer on her the status of a feme sole.

Stacey v. *Lintell* (1878) 4 Q. B. D. 291 and *Peatfield* v. *Childs* (1899) 63 J. P. 117 distinguished.

Case stated by a Metropolitan Police Magistrate.

The respondent was delivered of a bastard child on May 1, 1916, she being then an unmarried woman. The appellant, Boyce, was the father of the said child, and between May, 1916, and May, 1917, made payments to the respondent for its maintenance. On December 9, 1919, the respondent married J. A. Cox, with whom she lived and cohabited until November 25, 1920, when she left him owing to his cruelty. There was one child of the marriage. Prior to the marriage the said J. A. Cox knew of the illegitimate child, and from the date of the marriage till November 25, 1920, the illegitimate child lived with the respondent and her husband, and was maintained by the husband. On January 18, 1921, the respondent was granted a separation order against her husband at the North London Police Court on the ground of his cruelty, and he was ordered to pay 10*s.* a week for the maintenance of the respondent and the child of the marriage, of which she was given the custody. The existence of the illegitimate child was mentioned to the Court, but in stating the present case the magistrate expressly intimated that the 10*s.* he had awarded was not intended

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to include anything for the maintenance of that child. On January 26, 1921, the respondent applied at the same Court and before the same magistrate for an affiliation order against the appellant, and the magistrate, being of opinion that she was a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3 (1), ordered the appellant to pay 7*s.* 6*d.* a week until the child should attain the age of sixteen.

R. F. Colam K.C. and *Hilton D. Warner* for the appellant. Admittedly "single woman" has a wider meaning than "unmarried woman," but the test whether the mother is a "single woman," is whether two people will be liable to maintain the child at the same time.

[The following cases were cited on this point: *Peatfield* v. *Childs* (2); *Stacey* v. *Lintell* (3); *Reg.* v. *Pilkington* (4); *Tozer* v. *Lake* (5); *Healey* v. *Wright* (6); *Lang* v. *Spicer* (7); *Plymouth Guardians* v. *Gibbs.* (8)]

Here the husband was liable under the Poor Law

(1) By the Bastardy Laws Amendment Act, 1872, s. 3: "Any single woman who may be with child or who may be delivered of a bastard child . . . . may . . . . make application . . . . for a summons to be served on the man alleged by her to be the father of the child. . . . ."

By the Poor Law Amendment Act, 1834, s. 57: "Every man who from and after the passing of this Act shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family . . . . until such child or children shall attain the age of sixteen, or until the death of the mother."

By the Summary Jurisdiction (Married Women) Act, 1895, s. 5: "The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing . . . . (*a*) a provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty)."

By the Matrimonial Causes Act, 1857, s. 26: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding."

(2) 63 J. P. 117.
(3) 4 Q. B. D. 291.
(4) (1853) 2 E. & B. 546.
(5) (1879) 4 C. P. D. 322.
(6) [1912] 3 K. B. 249.
(7) (1836) 1 M. & W. 129.
(8) [1903] 1 K. B. 177.

Amendment Act, 1834, s. 57, and that liability was not got rid of by a separation order against him. The respondent should have applied to the magistrate to vary his order against the husband by making provision for the maintenance of the illegitimate child. The appellant is not liable at the same time as the husband.

G. L. Hardy for the respondent. The magistrate had no power to provide in the separation order for the maintenance of this child for the Summary Jurisdiction (Married Women) Act, 1895, only extends to children of the marriage. The true test of whether the respondent is a "single woman" is not whether so to hold would create a double liability for maintenance: it is a question of the status of the woman at the time of obtaining the affiliation order. In this case the combined effect of the Matrimonial Causes Act, 1857, s. 26, and the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (*a*), is to give her the status of a feme sole, and that distinguishes this case from those which have been cited on the other side. If the appellant is right, no one is liable to maintain this child: ex hypothesi, the father is not; while the husband can say: "My liability is limited to 10*s*. a week by the terms of the separation order."

Colam K.C. in reply.

LORD TREVETHIN C.J. [after stating the facts, continued:] The affiliation order is objected to on the ground that the respondent is not a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3. I think the respondent's contention is right. By the Summary Jurisdiction (Married Women) Act, 1895, a separation order is to have the effect of a decree of judicial separation on the ground of cruelty. The Matrimonial Causes Act, 1857, s. 26, says that a woman who obtains such a decree is to be regarded as a feme sole. That seems to me to distinguish this case from those cited by Mr. Colam for the appellant. The respondent has a distinct status, conferred by the Act; she is a "single woman," not living with her husband, and this appeal must be dismissed.

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SANKEY J. I agree. The only point the Court has to decide is whether the respondent is a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872, s. 3. The Courts have from time to time given definitions of the term "single woman," of which some have been cited, but it is to be observed that in this case the respondent had already obtained a separation order from the magistrate, which, by s. 5 (*a*) of the Summary Jurisdiction (Married Women) Act, 1895, is to have the effect of a decree of judicial separation. The effect of judicial separation, as defined in the Matrimonial Causes Act, 1857, s. 26, is that the respondent is to be considered as a feme sole. The main argument advanced by the appellant is that if the contention of the respondent is correct two persons may be liable. I do not know whether this may be so, but in the cases which have been cited the circumstances were different, because there was no separation order. In *Stacey* v. *Lintell* (1) in particular, the wife was living with her husband at the date of the application. In this case the respondent was not merely not living with her husband, as was the case in *Peatfield* v. *Childs* (2), but was actually separated from him by an order of the Court.

ACTON J. I agree.

Appeal dismissed.

Solicitors for appellant: *Edmond O'Connor & Co.*
Solicitors for respondent: *Tilley & Watts.*

(1) 4 Q. B. D. 291. (2) 63 J. P. 117.

J. W. H.

LONDON COUNTY COUNCIL *v.* WETTMAN.

1921
Oct. 27;
Nov. 4.

Shop Assistant—Weekly Half-holiday—Employment by same Employer in another Shop—Shops Act, 1912 (2 & 3 *Geo.* 5, *c.* 3), *ss.* 1, 2.

By s. 1, sub-s. 1, of the Shops Act, 1912, "on at least one weekday in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon."

The respondent carried on the business of a retail confectioner at two shops, A and B, situate in different parts of London. A shop assistant employed by him at shop A was found to be working at shop B on the afternoon of the day of the week fixed under the Act as her weekly half-holiday at shop A:—

Held, that in employing her at shop B the respondent was employing her "about the business of" shop A, and was thereby committing a breach of the above section.

The words "employed about the business of" a shop are of wide application and mean "about the business carried on in the shop by the shopkeeper."

CASE stated by Metropolitan Police Magistrate.

The respondent was summoned upon an information under the Shops Act, 1912 (1), charging that on Wednesday, December 8, 1920, he employed in his shop at 263 Old Street in the county of London, after 1.30 P.M., a shop assistant, Wednesday being the day specified in a notice affixed in

(1) Shops Act, 1912 (2 Geo. 5, c. 3), s. 1, sub-s. 1, of the Shops Act, 1912: "On at least one week day in each week a shop assistant shall not be employed about the business of a shop after half-past one o'clock in the afternoon."

Sub-s. 2: "The occupier of a shop shall fix and shall specify in a notice in the prescribed form, which must be affixed in the shop in such manner and at such time as may be prescribed, the day of the week on which his shop assistants are not employed after half-past one o'clock, and may fix different days for different shop assistants."

By sub-s. 4 a penalty is imposed for a failure to comply with the provisions of the section.

Sect. 19, sub-s. 1: "In this Act the expression 'shop' includes any premises where any retail trade or business is carried on."

The prescribed form of notice as to shop assistants' weekly half-holidays (Statutory Rules and Orders, 1912, No. 316, Sch. 1) is as follows: "I hereby give notice that the assistants employed in this shop / room / department will not be employed about the business of the shop after 1.30 P.M. on the day named below in the week following the date of this notice and until further notice." (Then follows the names or class of assistants, the weekday on which the half-holiday is allowed, the signature of the occupier or manager, and the date.)

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the respondent's shop at 30 Goodge Street, as that on which the said shop assistant was not to be employed about the business of a shop after 1.30 P.M. At the hearing of the information, the following facts were proved or admitted.

The respondent was the occupier of two retail confectioners' shops in London, one at 263 Old Street, E.C., and one at 30 Goodge Street, W.C. The shop assistant, Miss Wilson, to whom the proceedings related, was employed by the respondent in his shop at 30 Goodge Street. Wednesday was the day of the week fixed by the respondent for this assistant's weekly half-holiday pursuant to the Shops Act, 1912. On Wednesday, December 8, 1920, an inspector under the Act visited 30 Goodge Street and, seeing the respondent there, asked where Miss Wilson was. The respondent replied that she was having a day's holiday. The inspector then went to 263 Old Street, E.C., the respondent's other shop, where he found Miss Wilson employed about the business of that shop, dressing the shop window, between 5.30 and 6 P.M. It was contended on behalf of the respondent that, upon these facts, no offence had been committed by him; that the words "about the business of a shop" in s. 1, sub-s. 1, of the Shops Act, 1912, meant "about the business of the particular shop where the assistant is generally employed." In support of this contention, *George* v. *James* (1) was cited and the prescribed form of notice as to assistants' weekly half-holidays in Sch. 1 of the Statutory Rules and Orders, 1912, No. 316, was referred to. (2) It was contended on behalf of the appellants that the words "about the business of a shop" meant "about the business of any shop belonging to the same employer."

The magistrate being of opinion that he was bound by the judgment of Channell J. in *George* v. *James* (1), dismissed the information. At the request of the appellants, he stated a case for the opinion of the High Court.

H. D. Roome for the appellants. The words of s. 1, sub-s. 1, of the Shops Act, 1912, are wide enough to include the present

(1) [1914] 1 K. B. 278, 281. (2) See note (1) ante, p. 153.

case. They refer to employment "about the business of a shop," which is distinct from the expression "in or about a shop" used in s. 2, sub-s. 1, of the Act. Where an employer carries on the same business in several shops, a person employed in one of such shops is employed "about the business" of all of them: all the branches are to be regarded as one business. In *Hampton* v. *Winward* (1) the general principle to be applied in interpreting the words of a statute is enunciated by Lawrence C.J. as follows: "I am prepared to give a very liberal construction to any Act when the carrying out of its main purpose requires it. . . . ." The learned magistrate relied upon a passage from the judgment of Channell J. in *George* v. *James* (2): "I think it is clear that the words 'a shop assistant shall not be employed about the business of a shop' mean 'about the business of the particular shop in which he is an assistant.'" But these words are qualified by the passage which follows, which reads: "If a shop assistant likes to accept employment during his half holiday in another shop in the neighbourhood owned by another proprietor but where a similar business is carried on there is nothing in the Act of Parliament to prevent his doing so, and the manager of that shop in so employing him will commit no offence." Channell J. obviously had in mind the case of employment in a shop owned by a different proprietor, and not that of employment in another shop owned by the same business proprietor. His remarks therefore have no bearing on the present case.

The respondent was not represented.

Cur. adv. vult.

Nov. 4. The following judgment of the Court (Lord Trevethin C.J., Sankey and Acton JJ.) was read by

LORD TREVETHIN C.J. We assume from the findings in this case that the assistant was employed at Old Street with the knowledge and consent of her employer: it is therefore unnecessary to consider the case of *Ward* v. *W. H. Smith & Son.* (3) Upon the point of law raised by this case the learned

(1) [1921] 2 K. B. 669, 672. (2) [1914] 1 K. B. 278, 281.
(3) [1913] 3 K. B. 154.

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magistrate held that he was bound by the words of Channell J. in *George* v. *James* (1)—namely, the words "a shop assistant shall not be employed about the business of a shop" mean "about the business of the particular shop in which he is an assistant." He then appears to have assumed that, upon the facts found by him in this case, a shop assistant employed in dressing the window of the shop at 263 Old Street, was not employed about the business of the shop at 30 Goodge Street. It is here that we do not quite follow him. In our opinion it is open to the Court to accept the words of Channell J. as they stand in relation to the facts of the present case (very different, by the way, from those in *George* v. *James* (1)), and yet decide with all respect to the learned magistrate, that the conclusion at which he arrived was wrong.

The words "employed about the business of a shop" clearly are, and are intended to be, capable of very wide application. They may readily be contrasted, for example, with such words as "employed in a shop" or "in or about a shop," which are the words found in s. 2, sub-s. 1, of the Act. Now, with regard to the words "the business of a shop," strictly speaking a shop cannot be said to have a business. "The business of a shop" or "a shop's business" is indeed, to the logical mind, a figurative expression. It may, we think, be fairly paraphrased for the purposes of this case as "the business carried on in that shop by the shopkeeper." Here the business carried on by the respondent at the shop in Goodge Street was that of the retail sale of confectionery. But he did not carry on that business at Goodge Street exclusively. He also carried on that business at 263 Old Street. He carried on that business partly in one shop and partly in the other. Upon these facts it seems to be no straining of language to say that a person employed by the respondent in window dressing at 263 Old Street, was employed "about the business" carried on at 30 Goodge Street, or, in other words, about the business "of" the shop at 30 Goodge Street, though of course not "*in*" or "*in or about*" that shop. On the contrary, to say so appears to us

(1) [1914] 1 K. B. 278.

to be in accordance alike with strict reasoning and common sense. In the sense which we have sought to make clear, the business "of" the shop at 263 Old Street was also the business "of" the shop at 30 Goodge Street, and for the purposes of this decision there is no valid distinction to be made between them. Certainly to hold otherwise would (in the words of Channell J. in *George* v. *James* (1)) "be opening a wide door to evasion of the Act."

In our view indeed the true principle is established and illustrated by the decision in *George* v. *James*. (1) In that case a shop assistant engaged at a particular shop, which was one of a series of multiple shops, was employed at a distance from that particular shop in distributing advertisements of the wares dealt in at the whole series of multiple shops generally, his own included. It was held that he was "employed about the business of the particular shop" in which he was an assistant.

It is clear that he was in fact employed not about a business which was limited to "the particular shop in which he is an assistant," but about a business which extended far beyond any such limitation. In our opinion, a sound basis for the decision in *George* v. *James* (1) is that, for the purposes of that decision the "business of the shop" at Bargoed was to be regarded as a business of which a part only was carried on in that shop. We think, therefore, that the learned magistrate was wrong in dismissing the information and that this appeal must be allowed.

Appeal allowed.

Solicitor for appellants: *D. P. Andrews.*

(1) [1914] 1 K. B. 278.

F. P. F.

1921
Nov. 15.

SMITH *v.* WILLIAMS.

Revenue—Case stated by Commissioners—Death of Respondent before Case filed—Power to add Executor as Respondent—Taxes Management Act, 1880 (43 *&* 44 *Vict. c.* 19), *s.* 59.

The respondent successfully appealed to the General Commissioners against his assessment to income tax, whereupon the appellant, the surveyor, expressed his dissatisfaction, and by notice in writing under s. 59 of the Taxes Management Act, 1880, required the Commissioners to state and sign a case for the opinion of the High Court. Subsequently and before the case was signed and filed, the respondent died. A copy of the case when signed was served on the respondent's executor. On motion by the appellant that the proceedings in the appeal be continued between him and the executor and that the latter be added as respondent:—

Held (1.) that the proceedings in the appeal were begun in the lifetime of the respondent, inasmuch as the notice in writing given by the appellant to the Commissioners requiring them to state and sign a case was the commencement of the proceedings; (2.) that the proceedings did not abate on the death of the respondent, and that the Court was entitled, in the absence of apt procedure being provided by statute on the subject, to mould a convenient form of procedure so that the appeal could be heard, and that it would do this by ordering that the respondent's executor be added as respondent; and (3.) that service of a copy of the case on the executor was a sufficient compliance with s. 59 of the Taxes Management Act, 1880, as to serving the other party to an appeal with a copy of the case.

Hemming v. *Williams* (1871) L. R. 6 C. P. 480 and *Canning* v. *Farren* [1907] 2 I. R. 486 applied.

Motion by the appellant, Smith, a surveyor of taxes, for an order that the proceedings in the appeal be continued between him and John Snow, as executor of one Williams, and that Snow be added as respondent to the appeal.

In 1914, on an appeal by Williams (hereinafter called "the respondent") to the General Commissioners against an assessment of 1170*l.* to income tax, the Commissioners reduced the assessment to 584*l.* The appellant expressed dissatisfaction and duly required by notice in writing a case to be stated for the opinion of the High Court. In June, 1915, the draft case was prepared, and on various subsequent dates it passed for revision between the Solicitor of Inland Revenue and the respondent's solicitor, but it was not finally settled by November 9, 1919, when the respondent died.

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By his will the respondent appointed Snow his executor, who took out probate. In July, 1920, the draft case having been sent to Snow, was returned by him to the clerk to the Commissioners with the statement that it did not interest him. On December 11, 1920, the case was received by the Solicitor of Inland Revenue from the Commissioners duly signed; on December 14, 1920, the case was filed in Court and a copy served on Snow. A summons was thereafter taken out before the King's Remembrancer by the appellant for an order that Snow be added as respondent. The King's Remembrancer having referred the question to the judge taking revenue cases, the matter now came on for argument.

Sir Gordon Hewart A.-G. and *R. P. Hills* for the appellant. In *Fitzgerald* v. *Inland Revenue Commissioners* (1) and in a later unreported case where the taxpayer died pending the proceedings the Crown raised no objection to the personal representative being added as appellant in order that the appeal might be proceeded with. It is true that there has been no case where on an appeal by the surveyor the personal representative of the taxpayer has been added as a respondent, but it is submitted that s. 59 of the Taxes Management Act, 1880 (2), which gives a right of appeal in these cases, clearly contemplates the appeal being adjudicated upon, and the Court should not allow the proceedings to be

(1) [1919] 2 K. B. 154.

(2) Taxes Management Act, 1880, s. 59, sub-s. 1: "Immediately upon the determination of any appeal under the Income Tax Acts by the General Commissioners . . . . the appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the Commissioners who heard the appeal, and having so done may, within twenty-one days after the determination, require the Commissioners, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court thereon. The case shall set forth the facts and the determination, and the party requiring the same shall transmit the case, when so stated and signed, to the High Court within seven days after receiving the same, and shall previously to or at the same time give notice in writing of the fact of the case having been stated on his application, together with a copy of the case to the other party, being the surveyor, or the appellant, as the case may be." [This section is substantially reproduced in s. 149 of the Income Tax Act, 1918.]

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interrupted by the taxpayer's death but should add his personal representative as respondent.

A. M. Latter for the executor. The notice of motion asks for an order that the proceedings in the appeal be continued between the appellant and the executor. The first answer to that is that there are no proceedings in the appeal which can be continued. There were no proceedings in Court when Williams died, the case having been filed in Court long after his death. *Tetlow* v. *Orela* (1) decided that where an action is commenced in the name of a dead man his representative cannot be substituted as plaintiff. There Russell J. said that Order XVI., r. 2, did not justify the Court in creating a plaintiff in an action for the first time. Here the appellant seeks to substitute a respondent for the first time. The revenue authorities might have assessed the executor in respect of the duties due by the deceased, but they have not taken that course.

[SANKEY J. If, after filing the case, the appellant surveyor had abandoned the appeal would he have been liable for any costs ?]

There would be no one to whom he would be liable for them. In *Manchester Corporation* v. *Sugden* (2) the costs of settling a special case under this section, incurred before the filing of the case, were allowed on taxation, but the appeal in that case actually came on and was decided.

Secondly, even if it can be said that there were proceedings before the Court there is no statute which empowers the Court to do what the appellant asks it to do. At common law the proceedings would have abated on the death of Williams: see Smith's Action at Law, 10th ed., pp. 186, 187. That result is now obviated in ordinary actions by Order XVII., r. 1, but there is no rule or statute which prevents abatement in a proceeding of this kind.

Thirdly, in order that an appeal under s. 59 can be heard it is incumbent on the appellant to comply with the conditions precedent stated in the section, these including an obligation to send a copy of the case stated to the respondent:

(1) [1920] 2 Ch. 24. (2) [1903] 2 K. B. 171.

see *Edwards* v. *Roberts* (1) as to the analogous procedure under s. 2 of the Summary Jurisdiction Act, 1857. Here a copy of the case was not, and could not have been, served on Williams for by the time it was signed he was dead.

R. P. Hills in reply. When a case is required to be stated under s. 59, the obligation on the Commissioners to state it is imperative, and the section contemplates that a request for a case having been made the hearing of the appeal should not be interrupted by the death of one of the parties. It is not accurate to say that the proceedings only commence when the case is filed in Court. Costs have been incurred in the settling of the case before it is filed and these costs are costs recoverable from the unsuccessful party: *Manchester Corporation* v. *Sugden*. (2) Where a right of appeal is given but there is no specific provision for the procedure to be adopted if one of the parties dies, the Court will act on the analogy of the procedure under other statutes: *Hemming* v. *Williams* (3); *Canning* v. *Farren*. (4) As was said by Lord O'Brien C.J. in the latter case "when jurisdiction exists in a case in which apt procedure is not provided by statute, the judge must himself mould a convenient form of procedure, as did the English Common Pleas in *Hemming* v. *Williams*." (3) As to the other point, service of the case on the executor is a sufficient compliance with the provision of s. 59.

Latter pointed out in reference to *Hemming* v. *Williams* (3) that it was a proceeding between subjects, and submitted that it had no application where the Crown was a party.

SANKEY J. stated the facts and continued: Mr. Latter, on behalf of the executor, has taken three points, which I will deal with in the order in which he presented them.

First, Mr. Latter said that there are no proceedings in the appeal to be continued. As to that, it has to be remembered that an appeal to this Court in such a matter is of comparatively recent origin. The Income Tax Act, 1842, made

(1) [1891] 1 Q. B. 302.
(2) [1903] 2 K. B. 171.
(3) (1871) L. R. 6 C. P. 480.
(4) [1907] 2 I. R. 486, 501.

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the decision of the General Commissioners final. In 1874 power was first given to apply to have a case stated for the opinion of this Court, and by the Taxes Management Act, 1880, the procedure to be followed when a case is stated is laid down. Sect. 57 of the last-mentioned Act deals with appeals to the general or special Commissioners, and s. 59 prescribes the procedure by case stated. The section says that after the determination of an appeal by the Commissioners, "the appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the Commissioners . . . . and having so done may, within twenty-one days after the determination, require the Commissioners, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court thereon." Pausing there, I think the operation of those words is to make it mandatory upon the Commissioners to state a case if they are required to do so. The remainder of the section deals with the machinery under which the case is to be stated. Sub-s. 3 of the same section gives a right of appeal from this Court to the Court of Appeal and thence to the House of Lords. Sect. 92 provides that where a person chargeable with duties dies his executors or administrators are liable to and are to be charged with the payment of the duties the person so dying was chargeable with, and if his executors or administrators neglect or refuse to pay they may be proceeded against. Finally, by s. 111 duties may be sued for in the High Court. In my view, as soon as the notice in writing mentioned in s. 59 has been given requiring the Commissioners to state and sign a case for the opinion of the High Court, the proceedings have begun. The notice is the initiation of the proceedings and thereupon they continue, the duty is cast upon the Commissioners to state and sign a case forthwith and to transmit it when so stated and signed to the High Court, having previously or at the same time given notice in writing to the appellant of the fact of the case having been stated, and supplied a copy of the case to the other party. Normally the next step in the proceedings is the hearing of

the case in this Court, but the proceedings begin with the notice in writing to the Commissioners, and they may end with a decision of the House of Lords. I am unable to accept Mr. Latter's contention that the proceedings only begin when the case is filed in Court and that as in this case that step was not taken till after Williams was dead, there were no proceedings that could be continued.

Mr. Latter's second point was that if there were any proceedings they have abated, as they would have done at common law. I doubt whether it is possible to apply common law doctrines in a case of this character, inasmuch as the whole of this procedure is the creation of statute. I do not therefore think that because at common law on the like facts an action would have abated, the proceedings in this matter have abated on the death of the party chargeable to duties. The statute dealing with the matter has to be looked at, and for the reasons I have already given I cannot accept Mr. Latter's argument that because at common law an action abated on the death of a party, this proceeding abated on the death of Williams. But it is said that the appellant can point to no statute which enables him to take the present step. That is a formidable contention. One may not be able to put one's finger upon any particular passage in a statute giving the appellant the right which he now claims. But two cases have been cited, which seem to me to have a bearing upon this question; they are not identical with the present one, but are of a similar character, where it was not found easy to discover the proper remedy in circumstances like these. In *Hemming* v. *Williams* (1) the headnote is as follows: "Judgment having been given for the defendant in an action of ejectment in the county court, the plaintiff appealed to a superior Court. Before the hearing of the appeal the defendant died:—*Held*, that the death of the defendant did not deprive the plaintiff of his right of appeal, and that the Court would proceed by analogy to s. 166 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and would allow the plaintiff to proceed with the appeal after

(1) L. R. 6 C. P. 480.

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giving a notice similar to that required by that section." No reasoned judgment is given in the report, but in *Canning* v. *Farren* (1) the Court of Appeal in Ireland discussed the point with great thoroughness. The headnote in that case is as follows: "Where, after an appeal from a decree of the county court judge to the judge of assize, under 45 & 46 Vict. c. 29, s. 4, the appellant or respondent dies after notice of appeal, but before the hearing, there is jurisdiction in the judge of assize to adjourn the appeal to enable a personal representative of the deceased to be added to the record, and, upon this being done, there is jurisdiction to hear and determine the appeal." Lord O'Brien C.J., after referring to certain sections of the Act there under review said (2): "All these provisions show that the Legislature contemplated a hearing of, and an adjudication upon, every appeal, by the judge. Thus, the verbal and grammatical construction of the words is in favour of the existence of the jurisdiction. Further, this construction is necessary to give adequate effect to the intention of the Legislature. The mischief to be remedied was the possibility of an erroneous decision in the Court of first instance; but such a mischief, if it exists at the institution of the appeal, must continue at the assizes, notwithstanding the death of any party; and in order to make the remedy co-extensive with the mischief, we are driven to the construction we have adopted." The Lord Chief Justice referred to the English cases, including *Hemming* v. *Williams* (3), and added (4) that "this construction has since been uniformly adopted," the construction, namely, which allows the matter to proceed by adding the personal representative of the deceased person in order to give adequate effect to the intention of the Legislature. Later in his judgment he said (5): "A suit is not dead because it is abated." That is the view expressed in Pemberton on Revivor, p. 15. "It is suspended only, and is capable of being revived by procedure; and when jurisdiction exists in a case in which

(1) [1907] 2 I. R. 486.
(2) Ibid. 499.
(3) L. R. 6 C. P. 480.
(4) [1907] 2 I. R. 500.
(5) Ibid. 501.

apt procedure is not provided by statute, the judge must himself mould a convenient form of procedure, as did the English Common Pleas in *Hemming* v. *Williams*. (1)" Having come to the conclusion that the object of s. 59 of the Taxes Management Act, 1880, is to enable the parties to come to the High Court, I think, adopting the language of Lord O'Brien C.J., that the section shows "that the Legislature contemplated a hearing of, and an adjudication upon every appeal"; and being of the opinion already expressed that the proceedings in this matter started as soon as the notice in writing was given requiring a case to be stated I hold that I am entitled to do what was done in *Hemming* v. *Williams* (1) and *Canning* v. *Farren* (2)—namely, mould a convenient form of procedure to meet the case. Mr. Latter contended that this cannot be done where the Crown is a party. I cannot agree. For the moment I am not thinking of the Crown, but of the subject when he is the appellant. It would be the height of injustice if it were to be held in a case where the subject desired to appeal against an assessment which he considered excessive that the appeal should be shut out where he had died after applying for a case to be stated.

Mr. Latter's third point was that s. 59 requires a copy of the case stated to be served upon the other party, and he says that a copy was not served upon Williams. It follows from what I have already decided upon the first point that his executor stands in this matter in the place of Williams and I think that service upon the executor is service within the meaning of s. 59. I therefore make an order in terms of the motion.

Order in terms of motion.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for executor: *Finch, Jennings & Tree, for T. W. McLean, Liverpool.*

(1) L. R. 6 C. P. 480. (2) [1907] 2 I. R. 486.

J. S. H.

1921
June 30;
Oct. 10.

In re UNEMPLOYMENT INSURANCE ACT, 1920.

In re APPLICATION BY JUNIOR CARLTON CLUB.

Insurance (Unemployment)—Employed Persons—Excepted Employments—Domestic Service—Club Servants—Unemployment Insurance Act, 1920 (10 & 11 *Geo.* 5, *c.* 30), *ss.* 1, 10, *First Schedule, Part I.* (*a*), *Part II.* (*b*).

By s. 1 of the Unemployment Insurance Act, 1920, all persons of the age of sixteen and upwards engaged in any of the employments specified in Part I. of the First Schedule to the Act, not being employments specified in Part II. of that Schedule, are to be insured against unemployment in manner provided by the Act.

The "Excepted Employments" (Part II. of the Schedule) include: "(*b*) Employment in domestic service, except where the employed person is employed in any trade or business carried on for the purposes of gain."

The Junior Carlton Club employed upon their premises in Pall Mall persons who served in the following capacities: Cashier, billiard marker, commissionaire, wine butler, house porter, hall porter, housekeeper, coffee-room superintendent, engineer, waiters, cooks and housemaids:—

Held, that these servants were persons engaged in domestic service, within the exception contained in Part II. (*b*) of the First Schedule to the Act, and were not liable to the obligations, or entitled to the benefits of the Act.

Judgments of the Court in *Pearce* v. *Lansdowne* 69 L. T. 316 applied.

Semble, domestic servants are servants whose main or general function it is to be about their employers' persons, or their establishments, residential or quasi-residential, for the purpose of ministering to their employer's needs or wants, or to the needs or wants of those who are members of their establishments, or of those resorting to such establishments, including guests.

APPEAL from the decision of the Minister of Labour under s. 10, sub-s. 1, of the Unemployment Insurance Act, 1920.

The appellants, the Junior Carlton Club, employed upon their premises in Pall Mall persons who served in the following capacities: Cashier, billiard marker, commissionaire, wine butler, house porter, hall porter, housekeeper, coffee-room superintendent, engineer, waiters, cooks and housemaids. Application was made to the Minister of Labour to decide whether their employment was such as to make them "employed persons" within the scope of the Unemployment Insurance Act, 1920. The Minister of Labour decided this question in the affirmative, and the present appeal arose

under s. 10, sub-s. 1, of the Unemployment Insurance Act, 1920, which provides that "(i.) any person aggrieved by the decision of the Minister on any such question may appeal from that decision to the High Court." It was expressly admitted on behalf of the Minister of Labour that the Club was not carried on as a trade or business for the purposes of gain.

C. W. Lilley (*J. S. Mellor* with him) for the Minister of Labour. Unemployment insurance was introduced by the National Insurance Act, 1911, but its application was then confined to certain trades. The Act of 1920 applies to all persons mentioned in Part I. of the First Schedule of the Act, those in Part II. of the Schedule being excepted. Among the exceptions are persons employed in domestic service.

In deciding whether a person is a servant, not only the nature of the duties to be performed should be considered, but also the circumstances under which these duties are performed. In *Pearce* v. *Lansdowne* (1) it was held that the duties of a potman employed in a public-house were of a menial or domestic nature and that he was therefore not a workman within the Employers Liability Act, 1880. In *Nicoll* v. *Greaves* (2) it was held that a huntsman by virtue of his close relationship with his master, as one of his retinue, was a "menial" servant. The terms "domestic" and "menial" are synonymous as applied to a servant, and the word "menial" does not occur in the Act of 1920. According to Atkin L.J. in his judgment in *London County Council* v. *Perry* (3) it is the personal relationship between employer and employed which determines whether the service is domestic.

[ROCHE J. Would it not be true to say that domestic servants are those servants whose function it is to be about their employers' persons, or establishments, for the purpose of administering to their needs or wants or to the needs or wants of those resorting to such establishments, including guests ?]

(1) (1893) 62 L. J. (Q. B.) 441; 69 L. T. 316.
(2) (1864) 17 C. B. (N. S.) 27.
(3) [1915] 2 K. B. 193, 212.

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Yes, but it is submitted that even assuming that the duties are of a domestic nature, the only safe test is that of residence, and that is the test which has hitherto been adopted by the Minister of Labour. The huntsman in *Nicoll* v. *Greaves* (1), although not resident in the house, was in his master's retinue; for Byles J. in his judgment says: "The huntsman was always considered one of the retinue, even of the Princes of the Church in olden times."

Rayner Goddard for the Junior Carlton Club. The cases cited show that this question is always one of fact. A club servant is a domestic servant just as much as a servant in a private house. Residence is not essential. Both from the nature of their duties and from their relationship with their employers, the servants employed by the Junior Carlton Club must be regarded as domestic servants. A huntsman would not be held to be a domestic servant in modern times. As regards the suggested definition of domestic servants, the words "residential or quasi-residential" might be added after the word "establishments," in order to make the point as to residence quite clear.

Roche J. allowed the appeal and stated that he should deliver a considered judgment at a later date.

Cur. adv. vult.

Oct. 10. ROCHE J. delivered the following judgment: The Unemployment Insurance Act of 1920 (as I have been reminded by Mr. Lilley, appearing for the Minister of Labour) followed earlier unemployment insurance Acts, and may be taken to be a complement and an extension of those Acts The earlier Acts caused to be insured certain persons employed in a certain very limited number of trades, such as the engineering trade and the building trade. Under the present Act of 1920, by s. 1 all persons mentioned in Part I. of the First Schedule of the Act are insurable persons, unless they are persons mentioned in Part II. of the said Schedule. Amongst the class of employees mentioned in Part II. of the

(1) 17 C. B. (N. S.) 27.

Schedule are persons employed in domestic service, and such persons employed in domestic service are not to be insured, unless they are so "employed in any trade or business carried on for the purposes of gain."

In this case, the question argued before me was whether the club servants were domestic servants. The Minister of Labour decided, through those by whom he acts, that the club servants were not domestic servants. I was informed that the Minister adopted the view that, to constitute a person a domestic servant, residence upon the employer's premises or in his dwelling-house was necessary. I do not say that that was the only element regarded by the Minister, but at all events, I was informed that that was regarded as essential. None of the club servants resided upon the premises, and for that reason (and it may be for other reasons) it has been ruled by the Minister that the club servants were not domestic servants. I do not agree with that ruling, nor with that method of reasoning.

My reasons for dissenting from that ruling and for allowing the appeal are shortly as follows: The meaning of the words "domestic" or "menial" servant (terms which have often been used quite interchangeably) has often been discussed and decided. I think that the "menial" has been rightly omitted from the Act of 1920 because it has become, through a secondary meaning, rather derogatory to the person to whom it is attached. In its origin, apparently, according to the best accepted definition, it simply means the same as "domestic" servant—i.e., a person employed within the walls (1) or dwelling or domain of his employer. The definition or description which I regarded as proper to guide me, is to be found in a case of *Pearce* v. *Lansdowne*. (2) The actual question there was whether a potman was a "domestic" or "menial" servant. Judgment was given by Williams and Collins J.J. (afterwards Master of the Rolls). In the judgment of Collins J. I find this passage: "I agree that this question"—that is the

(1) [The word is unconnected with *moenia*; it is formed from *meinie* = *mesnée*, in Latin *mainada* and other forms, *quasi mansionata*: see Du Cange *s.v. maisnada*.—F. P.]

(2) 69 L. T. 316, 319.

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question whether a person is a domestic or menial servant—"must vary with the facts of each particular case, and for the principle that I am to apply I can find no better statement than that which is enunciated in Roberts' and Wallace's book on Employers' Liability, at p. 214, viz., that menial servant denotes 'those persons whose main duty is to do actual bodily work as servants for the personal comfort, convenience, or luxury of the master, his family and his guests, and who for this purpose become part of the master's residential or *quasi*-residential establishment.' I do not think that the direction which ought to be given to a jury could be better stated." In passing, I may say that the word "*quasi*-residential" would have been very aptly chosen, if the learned author or the learned judge had had in mind the club with which I am dealing. The judgment of Collins J. continues: "With regard to the derivation of the word 'menial' whether or not it be Greek or Latin, etc., I prefer the view adopted by Johnson, and which has the authority of Lawson J. in *Lawler* v. *Linden* (1)—namely, that it is from the Saxon word *meiny* or *mesnie*, which signifies a household or family. It seems to me, therefore, on the whole, that this particular person did become part of the residential, or *quasi*-residential establishment of his master." I shall not endeavour to formulate a definition of what is a "domestic servant," even for the purposes of this Act. But if I had, in my own words, to describe what are the characteristics of such a servant I should express it, and do express it for present purposes, in the way that I sought to express it in the course of the argument in this case—namely, that domestic servants are servants, whose main or general function it is to be about their employers' persons, or establishments, residential or quasi-residential, for the purpose of ministering to their employers' needs or wants, or to the needs or wants of those who are members of such establishments, or of those resorting to such establishments, including guests. That description, which, as I say, is not intended to be an exhaustive one, certainly covers the case of a club, and that is my reason for deciding that the club servants, as they are

(1) (1876) Ir. R. 10 C. L. 188.

commonly called, are domestic servants within the meaning of Part II. of the First Schedule of the Unemployment Insurance Act, 1920.

Before leaving this case, I only desire to add that the number of persons who were involved in the decision is somewhat large, and one man is included whose occupation is, to some extent, that of an engineer; he performed the functions of an engineer in connection with the electric lighting and the heating of the club. I do not give any decision upon the question whether he would otherwise fall within the category of domestic servant, because the Ministry, through its counsel, disclaimed any desire to differentiate between those persons. It is quite obvious that it would be in the highest degree inconvenient both for employer and employed, and to the officials who have to administer and act, if nice distinctions were made in one household establishment between this person and that person, according to their special qualifications or special functions in the establishment. Substantially it was admitted that all those persons were on one footing and that they were either domestic servants, or they were not. That attitude being adopted, and wisely adopted, I decide that they all are domestic servants, and that they are none of them insurable nor entitled to the benefits of the Act.

Appeal allowed.

Solicitors for appellants: *Norton, Rose & Co.*
Solicitor for the Ministry of Labour.

F. P. F.

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In re UNEMPLOYMENT INSURANCE ACT, 1920.

In re APPLICATIONS BY DR. DAVID AND OTHERS.

In re AN APPLICATION BY H. E. BRYANT.

Insurance (Unemployment)—Employed Persons—Excepted Employments—Domestic Service—Public School—Servants in Master's House—Butler—Cook—Servant of Governors—School-cleaner—Unemployment Insurance Act, 1920 (10 & 11 *Geo.* 5, *c.* 30), *s.* 1; *s.* 10; *s.* 47, *sub-s.* 2; *First Schedule, Part II.* (*b*).

The Unemployment Insurance Act, 1920, s. 1, provides that persons of the age of sixteen and upwards who are engaged in any of the employments specified in Part I. of the First Schedule to the Act, not being employments specified in Part II. of that Schedule, shall be insured against unemployment in manner provided by the Act.

Part I. of the First Schedule specifies (inter alia) employment in the United Kingdom under any contract of service.

Part II. of that Schedule, which is headed "Excepted employments," specifies (inter alia): "(*b*) Employment in domestic service, except where the employed person is employed in any trade or business carried on for the purposes of gain."

Rugby School, which was one of the great public schools of England, was controlled by, and its property was vested in, a governing body. The staff of the school included the headmaster and assistant masters, who rendered professional services as teachers for which they received fixed salaries from the governing body. The headmaster and several of the assistant masters also conducted boarding houses let to them by the governing body, in which they boarded and tutored pupils of the school in consideration of a boarding fee regulated by the governing body and payment for extra disbursements. The contract for the education and board of the pupil was made between the governing body and the parent of the pupil. At the end of each term the governing body on receiving from the parents the amounts due from them which covered the education, board, and extras of the pupils, paid to the house master a sum which included the boarding fee and extras of each of the pupils in his house. The amount payable to the house master was such a sum as should repay to him his estimated outlay on board and extra cost in the management of the house. The balance retained by the governing body was such a sum only as was required for supplementing the endowment income of the school for the purpose of paying its running expenses. The remuneration of the house master from the boarding house depended upon the amount of the boarding fee, the cost of commodities, and his own management; but by good management he expected to make some profit by keeping the house and undertaking the increase of work involved in so doing.

Brigg public school was a grant-aided secondary school controlled by a governing body. Its income was derived from the fees of scholars,

grants from the Board of Education and the county council, and an endowment. The headmaster was given and carried on a boarding house for scholars at the school. The boarding fees were fixed by the said governing body, board, and council. From the total fees payable to the governing body by the parents of the pupils the sum allowed for boarding was deducted and paid to the headmaster. The fees fixed for boarding were 40*l.* a year for boys over twelve and somewhat less for boys under that age. The school terms aggregated thirty-nine weeks in the year. The headmaster was responsible for making the fees for boarding cover the cost and any deficiency was borne by him.

At Rugby School a butler was employed by the headmaster in the boarding house kept by him; a cook was employed by an assistant master in the boarding house kept by him; and a school cleaner, who did not reside on the school premises, was employed by the governing body to clean the class rooms. At Brigg School a cook was employed by the headmaster in the boarding house kept by him:—

Held, first, that the employment of each of these servants, including that of the school cleaner, was an employment in "domestic service" within the meaning of the First Schedule, Part II. (*b*), of the above Act; secondly, that none of these servants was employed in a "trade or business carried on for the purposes of gain" within the meaning of that clause; and, consequently, that it was not necessary that any of them should be insured against unemployment under the Act.

THREE appeals from the Minister of Labour under the Unemployment Insurance Act, 1920, s. 10, sub-s. 1, and an issue for the decision of the Court under that sub-section.

Each of the cases raised the question whether an employment in a certain capacity at a public school was an employment excepted from the Act, the first three cases relating to Rugby School and the fourth case to Brigg School.

The following facts relating to Rugby School are taken mainly from affidavits made by the Rev. A. A. David, D.D., lately the headmaster of that school, the Rev. J. M. Hardwich, an assistant master of that school, and Lieut.-Col. G. E. Sharp, the bursar of that school:—

Rugby School was one of the schools included in the Public Schools Act, 1868 (31 & 32 Vict. c. 118). The school was controlled by, and its property was vested in the trustees, who formed the governing body. The income of the school was derived from endowments and from the fees and charges paid for the education and maintenance of the pupils. The bursar of the school, appointed by the governing body, was

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charged with the duty of supervising, regulating and collecting on behalf of that body the fees and charges payable by the parents and guardians of the pupils, and of paying what was due from the governing body to the masters as well as to any officials or servants directly employed by the governing body. The staff of the school included the headmaster, who supervised and organized the whole school and superintended the teaching, and upwards of thirty assistant masters, who taught the various classes of the school, the said headmaster and assistant masters receiving for the performance of these professional duties fixed salaries from the governing body. The headmaster and eight of the assistant masters also conducted boarding houses in which they boarded and tutored pupils of the school in return for boarding fees regulated by the governing body, part of each such house being reserved as the private residence of the master. These houses formed part of the property of the school. The headmaster occupied the schoolhouse which was let to him rent free, and the above-named assistant master occupied a house which was let to him at a full rent. In the house of the headmaster there were eighty-four pupils of the school, and in the house of the said assistant master there were fifty-six pupils. Each of these house masters owned the furniture and other appurtenants of the house, employed all its servants, and paid for all the provisions and other accessories supplied to it. As the cost of conducting the boarding house varied greatly from time to time with the price of commodities the remuneration of the boarding-house master varied accordingly, and was dependent to a large extent upon the fees authorized by the governing body, and paid to the master. The contract for the board and education of every pupil in the school was made between the governing body or its representative and the parent or guardian of the pupil, and all fees were charged through the bursar against the parent. At the end of each term the house master rendered an account to the governing body through the bursar of all extra disbursements made on behalf of each pupil and not covered by the boarding fee. The bursar sent to the parent an account for these extra

disbursements together with an account for the education fee and the boarding fee for the next term, which were payable in advance. On receiving from the parent payment for the whole amount the governing body, through the bursar, paid the house master a sum which included the boarding fee and the extra disbursements. The house master did not himself receive any payment direct from the pupil's parent or guardian, and there was no contract between them and himself. The house master was not under any obligation to render any accounts to the governing body concerning the conduct of his household. The governing body from time to time regulated and fixed the amounts chargeable for the education and board and maintenance of the pupils.

The amount payable to the house master was such a sum only as should repay to him his estimated outlay on board and services and extra cost in the management of the house. The balance retained by the governing body was such a sum only as was required for supplementing the endowment income of the school for the purpose of paying its running expenses. No person derived any pecuniary gain from the income or earnings of the school beyond the respective salaries and wages of the members of the school staff and its employees earned in their several occupations.

In the house of the headmaster one W. E. Busby was continuously and regularly employed as a butler or boys' man. His duties were to help to lay the table for meals, to wait, to wash up, generally to superintend the internal housework and on special occasions to assist the domestic staff of the headmaster's household, and he ministered to the convenience and comfort of the inmates of the residential establishment. His wage was paid monthly during both school terms and holidays and his service was terminable by a month's notice on either side.

In the house of Mr. Hardwich one Annie Pugh was continuously and regularly employed as a cook. She lived in the house, her wage was paid monthly during both school terms and holidays, and her service was terminable by a month's notice on either side.

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In the school one Thomas Garlick had been continuously and regularly employed since October, 1920, by the bursar on behalf of the governing body as a cleaner, his duties being to clean and generally to look after certain of the school premises used for educational purposes only. He did not reside on the school premises, his wage was paid weekly, and his service was terminable by a month's notice on either side.

The following facts relating to Brigg School are taken from an affidavit made by Mr. Herbert Edward Bryant, the headmaster of the school: Brigg School, in the county of Lincoln, was a grant-aided secondary school controlled by a governing body under a scheme approved by the Board of Education, and was founded in 1869. Its income was derived from fees from scholars, a grant from the said Board, a grant from the county council, and an endowment of the founder. The headmaster was given and carried on a boarding house for scholars at the school, doing so as a term of his engagement and not having the option of refusing boarders. The fees for boarding were fixed by the governing body, the said Board, and the county council. The total fees were payable to the governing body, but in practice they were paid to the headmaster as agent of that body, and he deducted the sum allowed for boarding and paid the remainder to that body. The fees fixed for boarding were 40*l.* a year for boys over twelve and 37*l.* a year for boys under that age. These fees did not include laundry charges. The school terms aggregated in the year thirty-nine weeks. The headmaster was responsible for making the fees for boarding cover the cost, and any deficiency was borne by him.

At the said boarding house one Constance F. Grundy was employed as a cook, and in that capacity she attended to the requirements of the headmaster and the boarders.

Applications were made by the headmaster, the said assistant master, and the bursar of Rugby School respectively to the Minister of Labour for his determination of the questions whether the respective employments of the said butler, cook, and cleaner at that school made them

respectively employed persons within the Act; and by the headmaster of Brigg School whether the employment of the cook at that school made her an employed person.

The Minister decided the question in each of the three Rugby School cases in the affirmative, but he referred to the Court the question in the Brigg School case.

In the first three cases the applicants appealed, and in the fourth case an issue was stated between the applicant and the Minister.

On October 10, 1921, the appeals and the issue were heard by Roche J.

At the hearing, Dr. David, who had now become the Bishop of Bury St. Edmunds, attended as a witness. He stated in cross-examination by counsel for the Minister of Labour, that a master at Rugby School looked forward to getting a boarding house and making some profit by keeping it and undertaking the increased work involved in so doing, that the governing body allotted to the house master a certain sum in respect of each boy in his house, that that sum was varied from time to time, the variation depending partly upon the price of provisions, and that a house master expected that if his work at the boarding house increased the sum which he received would increase in the same proportion; and he stated in re-examination that the house master supervised the tuition of the boys in his house.

Sir Ryland Adkins K.C. and *Warwick Draper* for the appellants. In the present cases the question arises whether servants employed at public schools should be insured under the Unemployment Insurance Act, 1920.

It is not necessary that any of these servants should be insured under the Act, because they are exempted from it by the First Schedule, Part II. (*b*) (1), which provides that

(1) Unemployment Insurance Act, 1920, s. 1: "Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are engaged in any of the employments specified in Part I. of the First Schedule to this Act, not being employments specified in Part II. of that Schedule (in this Act referred to as 'employed persons'), shall be insured against unemployment in manner provided by this Act."

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employment in domestic service is excepted from the Act, except where the employed person is employed in any trade or business carried on for the purposes of gain.

The employment of each of these servants, including that of the school cleaner, is an employment in "domestic service" within the meaning of that provision. Each of them is a domestic servant according to the definition of that expression which has been adopted in several cases—namely, a person whose main duty is to do actual bodily work as a servant for the personal comfort, convenience, or luxury of the master, his family, and his guests: per Collins J. in *Pearce* v. *Lansdowne* (1); *In re Junior Carlton Club* (2); and see *In re Lawson.* (3) Each of these servants being engaged in domestic or menial work is a domestic servant whether the occupation of his employers is a trade or business or not: *London County Council* v. *Perry.* (4)

None of these servants is employed in a "trade or business" within the meaning of clause (*b*) aforesaid. The keeping of a boarding school is not a trade or business. It is an occupation of a unique character, which no doubt involves the supplying of board, service, and commodities, but which has for its main purpose the giving of instruction and the proper training of children in mind and body. The school is to be regarded as an extension of the home, the schoolmaster undertaking the work of instructing and training the child, which in an advanced and complicated state of

Sect. 47: "(2.) In determining any question as to whether any occupation in which a person is or has been engaged is or was such as to make him an employed person within the meaning of this Act regard shall be had to the nature of the work on which he is or was engaged rather than to the business of the person by whom he is or was employed."

"FIRST SCHEDULE.

"PART I.

"*Employments within the meaning of the Act.*

"(*a*) Employment in the United Kingdom under any contract of service. . . ."

"PART II.

"*Excepted Employments.*

. . . . .

"(*b*) Employment in domestic service, except where the employed person is employed in any trade or business carried on for the purposes of gain."

(1) (1893) 69 L. T. 316, 319.

(2) [1921] W. N. 246; see now ante, p. 166.

(3) [1914] 1 Ch. 682.

(4) [1915] 2 K. B. 193.

civilization can no longer be performed by the parent himself. The fact that the First Schedule, Part II. (*d*), excepts from the Act employment under any local or public authority, employment in the police force, and employment in the service of a railway company, shows that it cannot have been intended that employment at a public school should be regarded as an employment coming within the Act. The carrying on of a boarding school for boys in which water is used for domestic purposes has been held not to be a "business for which water is required" within the meaning of a special water Act: *Frederick* v. *Bognor Water Co.* (1); and see also *Oddenino* v. *Metropolitan Water Board.* (2) It is true that the carrying on of a school has been held to be a breach of a covenant not to carry on in a dwelling house any "trade or business": *Doe* v. *Keeling* (3), or any "business or calling": *Kemp* v. *Sober* (4); but these cases proceeded upon the ground that the object of the covenant was to prevent annoyance to the neighbourhood and that a school would cause noise and disturbance, and they have therefore no bearing upon the present case. Moreover, in the latter of these cases the covenant contained the word "calling," which is wider than trade or business.

The present appellants adopt the view expressed on behalf of the appellants in *In re North and Ingram* (5), when that case was argued in July last, that there is a distinction between a profession on the one hand and a trade or business on the other hand, a profession involving certain elements which a trade does not—namely, a preparatory course of academic study, the observance by its members of a common standard of conduct, and the desire not only to earn a profit but also to comply with a certain conception of professional duty. That view is borne out by the definition given in the Oxford Dictionary of "profession" as "The occupation which one professes to be skilled in and to follow. *a.* A vocation in which a

(1) [1909] 1 Ch. 149.
(2) [1914] 2 Ch. 734.
(3) (1813) 1 M. & S. 95.
(4) (1851) 1 Sim. N. S. 517.
(5) Infra, p. 188.

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professed knowledge of some department of learning or science is used in its application to the affairs of others or in the practice of an art founded upon it. . . . . *b.* In wider sense: Any calling or occupation by which a person habitually earns his living. Now usually applied to an occupation considered to be socially superior to a trade or handicraft. . . . ." A profession being distinct from a trade or business, the keeping or teaching of a school is an occupation of the former and not of the latter description: see *Luton* v. *Bigg* (1), where the opinion was expressed that a schoolmaster was not a trader within the statute of bankrupts; and see the definition in the Oxford Dictionary of "schoolmastering" as "The occupation or profession of a schoolmaster."

The contention of the respondent that each of these servants, except the cleaner, is employed not only in the school but in the boarding house of a housemaster, and that the keeping of a boarding house is a "trade or business" is not well founded. The boarding houses are not separate institutions, but are essential parts of the school, inasmuch as it is only by means of them that pupils whose homes are at a distance are able to attend the school. Even if the boarding house were a separate institution, the conducting of it would not be a trade or business.

If either of the schools in question is a trade or business, it is not a trade or business "carried on for the purposes of gain" within the meaning of clause (*b*) aforesaid. The school is not conducted by its governing body for the purpose of making money, but for the training and instruction of youth. The fees charged by the governing body to the parents of the pupils are only such as will suffice for paying the salaries of the masters and officials and for maintaining the school premises, and are not such as to yield a profit to the governing body. Neither is the conducting of the boarding house a trade or business carried on for the purposes of gain. The fee paid by the governing body to the house master gives the latter no more than a reasonable remuneration for the board, tuition and supervision of the pupils in the house. The

(1) (1691) Skin. 291, 292.

house master by careful management or when the prices of commodities are lower, may no doubt save a proportion of these fees, but he cannot on that account be said to carry on the house for gain. The occupation of a schoolmaster does not become a trade or business merely because in the course of carrying it on he gets gain and buys and sells goods: *Luton* v. *Bigg* (1); and see *Patten* v. *Browne* (2); or takes a payment: *Rolls* v. *Miller*. (3)

Further, s. 47, sub-s. 2, of the Act provides that in determining whether the occupation in which a person is engaged brings him within the Act, regard shall be had to the nature of his work rather than to the business of the person by whom he is engaged. Tried by that test, the occupation of each of the servants in question brings him or her within the Act.

C. W. Lilley (*J. S. P. Mellor* with him) for the respondent, the Minister of Labour. All the servants in question in these cases ought to be insured under the Act of 1920.

The employment of the cleaner at Rugby School is not an employment in "domestic service" within the meaning of the First Schedule, Part II. (*b*), of the Act (4), and therefore is not exempted from the Act: see per Collins J. in *Pearce* v. *Lansdowne* (5); and *In re Junior Carlton Club*. (6)

If the employment of these servants is an employment in domestic service, then each of them who is employed at Rugby School is employed in a "trade or business carried on for the purposes of gain" within the meaning of the First Schedule, Part II. (*b*) (4), so that his or her employment is excepted from the employments excepted from the Act by that part of that Schedule. Each of these servants is employed in a "trade or business" within the meaning of that clause of the Act. The contention on behalf of the appellants that a trade or business is entirely distinct from a profession, that the keeping of a school is in the nature of a profession, and that, therefore, employment in

(1) Skin. 291.
(2) (1817) 7 Taunt. 409.
(3) (1884) 27 Ch. D. 71, 85.
(4) See note (1) ante, pp. 177, 178.
(5) 69 L. T. 316, 319.
(6) [1921] W. N. 246.

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a school is not employment in a trade or business, is not well founded. The expression "trade or business" as used in the Act must be understood in its natural and ordinary sense, and when so understood it does not entirely exclude a profession. In *Smith* v. *Anderson* (1) Jessel M.R. said (2) that the word "business" is a word of large and indefinite import, and he cited with approval the definition of that term given in the Imperial Dictionary, according to which it includes "a particular occupation, ... trade, ... art, or profession." Trade is a specialised form of business, and it may be that trade is distinguishable from a profession; but the term "business" is sufficiently wide to comprehend many professions. The Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 39, applies to all trades and businesses excepting (inter alia) certain professions, so that in the contemplation of that Act a profession may be a business; and in *Inland Revenue Commissioners* v. *North and Ingram* (3) the boarding school there in question, but for the express exception from the Act of certain professions, would presumably have been held to come within the Act as being a business. To say that this Act of 1920 does not apply to any occupation in the nature of a profession would be to exclude from it one of the largest classes of human activity. The policy of the Legislature has been to extend the principle of insurance against unemployment to a constantly increasing number of occupations. This appears from the history of the legislation. Under the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 84, and Sixth Schedule the principle applied to seven trades only. During the war it was extended to munition industries. The Act of 1920 has introduced a comprehensive scheme under which many employments are expressly brought within the Act, and some are expressly excepted from it, but subject in turn to large exceptions.

Further, each of the three servants employed at Rugby School is employed in a trade or business "carried on for the purposes of gain" within the meaning of clause (*b*) aforesaid.

(1) (1880) 15 Ch. D. 247. (2) Ibid. 258.
(3) [1918] 2 K. B. 705.

At all events the butler and the cook being employed in boarding houses are employed in a business carried on for gain, because the evidence shows that the house masters by reasonably careful management can, and do in fact, make a profit out of the boarding houses.

As to the Brigg School case, while the respondent submits that a business is carried on at that school, he cannot contend that it is carried on either by the governing body or by the headmaster "for the purposes of gain," seeing that at that school a pupil is boarded and taught for thirty-nine weeks in the year for 40*l.* or less; and the respondent does not therefore insist that the cook at that school comes within the Act.

Sir Ryland Adkins K.C. replied.

ROCHE J. having concluded the first part of his judgment, which related to the case of *In re Junior Carlton Club* (1), continued as follows: I now pass to the second class of cases, the cases which have been argued before me to-day and which I compendiously style the public school cases, and I proceed to inquire whether the employees in these cases come under the Unemployment Insurance Act, 1920, or are excepted from it by the First Schedule, Part II. (b). The schools at which these cases have arisen are Rugby School, which is typical of the large public schools in this country, and the secondary school at Brigg, which is one of the old grammar schools of the country.

The Rugby School cases, which are taken as test cases, are those of a house butler employed in the schoolhouse by Dr. David the late headmaster, a cook employed in one of the other boarding houses by Mr. Hardwich an assistant master, and a cleaner employed in cleaning the schoolrooms who is employed directly by the governing body of the school through their bursar, Lieut.-Col. Sharp.

A question has arisen similar to the question with which I have just dealt in *In re Junior Carlton Club* (1)—namely, whether or not the cleaner is a domestic servant. I have no

(1) Ante, p. 166.

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doubt, considering all the facts, that he is. I am sure he may properly be described as a school servant, and his duties, although rendered to the school, are exactly analogous to the duties of cleansing premises for the purpose of convenience and health which a servant either male or female does anywhere else. He certainly falls within the description of a domestic servant which I gave just now in the *Carlton Club Case.* (1) He is ministering to the needs in the matter of cleanliness at once of his employers and those whom they have upon their premises—namely, the masters and boys of the school. I therefore decide that the school cleaner is a domestic servant. As I ventured to say on a former occasion the class of domestic servants is a very wide class, which includes servants of various grades from a housekeeper of great attainments and high position down to a scullery maid. I decide that a cleaner of this kind is a domestic servant.

The question remains whether the cleaner, and the butler and cook whose status as domestic servants has not been challenged, are brought within the Act again by reason of their coming within the further exception, which is attached to that general exception, of persons "employed in any trade or business carried on for the purposes of gain." I confess that this is a question which I have found to be one of considerable difficulty, but after having given it careful consideration I have arrived at a conclusion which I propose now to state. The Unemployment Insurance Act, 1920, which I have here to interpret, is a very special Act, and I have already given the history of the particular circumstances which led to its being passed. (2) Looking at the Act as a whole, and particularly at Part II. of the First Schedule as a whole, I am brought to the conclusion that the real object of this Act is to extend unemployment insurance, which was previously limited to a few employments, until it applied to most of the employments in the country, but with certain broad exceptions. The general scope of the Act is to extend the legislation to persons employed in commerce and industry as ordinarily understood.

(1) Ante, p. 166. (2) Ante, p. 168.

I reach the same conclusion by an examination of the particular words of this exception. I have no doubt whatever that for many purposes schoolmastering and schoolkeeping may be described as a business. Several cases have been cited to me in which it has been held that the carrying on of a school is a business within the meaning of a covenant not to carry on in a dwelling house any trade or business. Several cases have also been cited which tend to show that schoolkeeping may be and often is a business for the purpose of a particular statute. Counsel for the respondent has forcibly argued before me that the case of *Inland Revenue Commissioners* v. *North and Ingram* (1) shows that schoolkeeping is a business within the category of businesses which are covered by an enactment such as that now in question, unless it can be shown that some express words are to be found in the enactment to take schoolkeeping out of that category. I do not wish to express the slightest doubt as to the correctness of any of those decisions. In my view, however, not much assistance can be derived in construing this Act from decisions upon covenants or upon other Acts, and I propose not to refer to the large number of cases which have been cited to me, and which I have carefully considered.

It is unnecessary that I should follow in any detail the very interesting argument which has been addressed to me with a view to showing that schoolkeeping is a profession, because it is not disputed by counsel for the respondent that it is a profession. The whole force of his argument is directed to showing that although schoolkeeping is a profession it is also a business—not a trade but a business. I do not decide that no exercise of a profession can be the carrying on of a business; but I think that the nature of the professional occupation of a schoolmaster is relevant to the question whether that occupation can properly be described as a "trade or business carried on for the purposes of gain" within clause (*b*). It is certain that all trades, and I should think most businesses, are carried on for the purpose of gain.

(1) [1918] 2 K. B. 705.

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In my judgment the meaning of those last words, which might otherwise be regarded as surplusage, is to accentuate the commercial nature of the business which is being dealt with and provided for by the Legislature. Schoolkeeping is not only a profession requiring those personal characteristics resulting from training which are the essence of a profession as opposed to a trade or a business, but is uncommercial in its nature, its organization, and its methods. In this case the evidence, which I do not propose to review in detail, shows that all the contracts for fees are made between the governing body of the school and the parents of the scholar, and that out of the fees paid by the parents there is allowed to the boarding-house master a certain proportion of fees in respect of his remuneration as house master. On the proportion of fees being allocated to the house master, his remuneration will be more or less according to his management and to the prices of commodities, and it may be possible for him by good management to make his remuneration greater than it would otherwise be. Although there may thus be a commercial element—or, as some might call it with regret, a commercial taint—attaching to the keeping of a boarding house in a public school, yet essentially and in its main features in my judgment the undertaking is not a commercial business such as is being dealt with in this Act. The keeping of a school, for the education of children, as Sir Ryland Adkins has rightly said, is the taking over of part of the parents' duties in a state of society so developed that a parent cannot fulfil the whole of these duties for himself. Looking at the matter from another point of view, I think it may be said that a school is an organization or an institution for the training, physical, mental and moral, of young persons. Such an institution is not in my judgment a trade or business carried on for the purpose of gain such as is dealt with by the clause now under consideration.

I have been pressed on behalf of the respondent to treat the boarding house as the undertaking not of Rugby School but of the particular house master. I am unable to agree that that is the proper view of the facts. In my judgment

it is not. I think the whole school must be looked at as being one organization with special arrangements in regard to the boarding houses, such as have been described in the affidavits. For those reasons I decide that the persons in question in the Rugby School cases are not employed in a trade or business carried on for the purposes of gain. I have already decided that they are all domestic servants. It follows, therefore, that they are not insurable persons under the Act.

There remains the case of the Brigg School. That is not an appeal; it is a reference to me by the Minister of Labour. Mr. Lilley has frankly said that, although he would argue, as he argued in the Rugby cases, that there was a business carried on at Brigg School, yet he could not contend that it was carried on either by the governing body or by the headmaster for the purposes of gain. It appears that at that school the boys were boarded for thirty-nine weeks in the year, and not merely boarded but housed and supplied with service, for the sum of 40*l.* per annum. Mr. Lilley rightly recognized that that could only be possible by the assistance of endowments and State or municipal aid, and that those who were keeping boys for thirty-nine weeks for 40*l.* a year were not doing so for the purpose of gain. In that case, accordingly, no question now arises, and I hold that the cook there in question is not an insurable person.

Solicitors for applicants: *Vandercom & Co.*

Solicitor for Ministry of Labour.

J. R.

1921
June 29;
Oct. 10.

In re THE UNEMPLOYMENT INSURANCE ACT, 1920.

In re APPLICATIONS BY NORTH AND INGRAM.

Insurance (Unemployment)—Employed Persons—Excepted Employments—Domestic Service—Private Preparatory School—"Trade or business carried on for the purposes of gain"—Unemployment Insurance Act, 1920 (10 & 11 *Geo.* 5, *c.* 30), *ss.* 1, 10, *First Sch. Part II.* (*b*).

Certain persons were employed at a private preparatory boarding school for boys—namely, a matron, lady housekeeper, cook, pantry maid, dormitory maid and head laundryman. The matron was a trained nurse, and the lady housekeeper taught English for two hours a week, but with those exceptions all the persons were solely and wholly employed in normal domestic service. There was evidence that the main purpose of the proprietors of the school was to carry on the profession of schoolmasters, the profits being made on the fees charged for tuition, and that no gain or profit was sought or expected to be made out of the boarding and lodging of the boys, which were merely ancillary to the main purpose of the school:—

Held, that the employment of the persons above mentioned was not such as to make them "employed persons" within the meaning of the Unemployment Insurance Act, 1920, as the boarding and lodging of the pupils were subsidiary to their general training, nurture and education, and that no distinction could be drawn in this respect between public schools and private preparatory schools, and that the persons above mentioned were domestic servants and were not employed in a trade or business carried on for the purposes of gain within the meaning of that Act.

APPEALS from decisions of the Minister of Labour under s. 10, sub-s. 1, of the Unemployment Insurance Act, 1920.

The appellants, North and Ingram, were the joint proprietors of a private preparatory boarding school for boys at Farnborough, Hants. They employed at their school persons who served in the following capacities: matron, lady-housekeeper, cook, pantry maid, dormitory maid, and head laundryman. The matron had the general care of the boys' health and well being and superintendence of everything to do with dormitories. The lady-housekeeper bought the provisions and generally catered for the establishment both on the school and private side, supervised the servants and had the general care of the classrooms, playrooms, chapel and dining-hall. The cook cooked all meals for the school,

the servants and the private side of the house assisted by one kitchen maid and one scullery maid. The pantry maid, who was one of three similarly employed, set out the dining-hall tables, kept the dining-hall in order, and waited at the boys' meals, kept the school linen in repair, also assisted in waiting at the meals of the partners and partner's wife and assistant masters. The dormitory maid, who was one of four similarly employed, mended the pupils' clothes, etc., brushed their suits, packed and unpacked their luggage, and bathed the smaller boys. She also cleaned and tidied Mr. Ingram's sitting-room and bedroom. The head laundryman did all the washing of the boys' clothes and household linen, conveyed it from the school to the school's private laundry and brought it back to the school.

The matron was a trained nurse, and the lady housekeeper taught English subjects for two hours a week to a few of the smallest boys, but with those exceptions all the persons in question were solely and wholly employed in normal domestic service and were in no way connected with the work or profession of the school on its educational side. With the exception of the matron and the lady housekeeper they were engaged on the normal terms applicable to domestic servants.

Mr. North stated in an affidavit that the boarding and lodging of the pupils were merely ancillary to the main purpose of the school, which was to carry on the profession of schoolmasters, the profits being made on the fees charged for the tuition provided, and that no gain or profit of any kind was sought or expected to be made out of the boarding and lodging of the boys. In practice the cost of board and lodging was forecasted on the experience of preceding terms at a certain sum per pupil per term and was then combined with and contained in a gross terminal fee payable in advance which included their (the appellants') charges for the tuition and educational advantages they provided. Mr. North added that this system as appertaining to private preparatory schools was entirely different from that appertaining to boarding houses or hostels belonging to public schools in

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which profits were sought to be made by the master responsible therefor in respect of board and lodging.

Application was made to the Minister of Labour to decide whether the employment of those persons was such as to make them "employed persons" within the meaning of the Unemployment Insurance Act, 1920. The Minister decided that the employment of the persons in question was such as to make them employed persons within the meaning of the Act.

The applicants appealed on the ground that they did not carry on a trade or business, and that the persons in question were not employed in a trade or business carried on for the purposes of gain.

Sir John Simon K.C. and *Croom-Johnson* for the appellants.

C. W. Lilley and *J. S. P. Mellor* for the Minister of Labour.

The arguments in this case were in substance repeated in the *Rugby School Case* reported ante, p. 172, and consequently are not set out here.

Cur. adv. vult.

1921. Oct. 10. ROCHE J. The question with regard to private schools arises in connection with the preparatory school at Farnborough belonging to Messrs. North and Ingram. Mr. North, who has made the affidavit in this case, claims that private preparatory schools are in an a fortiori position as regards the public schools, and that preparatory school keeping is less of a trade or business than public school keeping. Dr. David in his affidavit in the *Rugby School Case* joins issue with that view. I do not intend to pursue the discussion except to say that I think the public schools have the best of the argument. At the same time I do not think that it is right to make a distinction between preparatory schools and public schools. I am satisfied that the boarding of the boys in these houses is subsidiary to their general training and nurture and education. In my judgment although the commercial element may be more present in the case of private preparatory schools than it is in the

case of a public school yet it is not sufficiently present to convert that which is an institution for the education and nurture of young persons into a business for the purposes of this particular Act of Parliament. I think that is giving a fair meaning to the Act of Parliament, and in so holding I am doing what I was invited to do by the Ministry of Labour —namely, to lay down a general working rule so far as I can for the administration of the Act of Parliament. In my judgment it would be a misfortune if I was driven by the Act of Parliament to make a distinction between the liability attaching to a cook or housemaid or butler employed in a house at Rugby and that attaching to a servant of the same class employed in a preparatory school which may be only two or three miles away. The result is that I hold that these employees in these schools, both public and private, are domestic servants, and that they are not employed in a trade or business carried on for the purposes of gain within the meaning of this particular Act of Parliament.

Appeal allowed.

Solicitors for the appellants: *Hopgood, Mills, Steele & Co.*
Solicitor to the Ministry of Labour.

R. F. S.

C. A.
1921
Nov. 2, 3.

[IN THE COURT OF APPEAL.]

NEILSON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Contract of Carriage—Owner's Risk Note—Construction.

The plaintiff delivered a number of packages to the defendants for carriage from L. to B. via M. on the terms of an owner's risk note, which provided that the defendants were not to be liable for "loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during any portion of the transit . . . . except upon proof that such loss, etc., arose from the wilful misconduct of the company's servants." The packages as delivered to the defendants were not addressed or labelled to B., but had on them old labels bearing the names of various stations in different parts of the country. The packages were put in a van reserved for the plaintiff, there being attached to the van some labels indicating B. as the destination. By the time the van arrived at M. the labels had somehow become detached, and the defendants' official at that station by mistake took the van off the train, and not knowing that the plaintiff's packages were destined for B., sent them to the places respectively specified on the old labels which they bore, with the result that their delivery was delayed:—

Held, that, as the delay resulted from the goods being sent on journeys outside the route contracted for, and as the words of exception in the consignment note would not convey to an ordinary person's mind that the defendants intended thereby to exempt themselves from responsibility even in the event of their so departing from their contract, the exceptions did not relieve the defendants from liability; and that it made no difference that the order given by the defendants' official which caused the goods so to go astray was given at a time when the goods were in process of carriage upon the contract route.

Foster v. *Great Western Ry. Co.* [1904] 2 K. B. 306 overruled.

APPEAL from the judgment of a Divisional Court on appeal from a county court, reported. (1)

The plaintiff, who was the manager of a touring theatrical company, entered into a contract with the defendants for the carriage of his company and their theatrical properties from Llandudno to Bolton. For that purpose he signed one of the defendants' forms which was headed: "Theatrical Companies. Combined form of application for tickets at reduced rates and consignment note for conveyance of scenery and luggage at Owner's Risk." The form contained

(1) [1921] 3 K. B. 213.

the following clauses: "I also request you to carry the personal luggage, costumes, scenery, and other usual equipment belonging to or used by the company above mentioned or by the members thereof at the owner's risk on the terms and conditions allowed to such companies shown below." "In consideration of your doing so I agree . . . . to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods (during any portion of the transit or while left in your possession to be stored) . . . . except upon proof that such loss, damage, misconveyance, misdelivery, delay, or detention arose from the wilful misconduct of the Company's servants." The plaintiff delivered to the defendants at Llandudno fifteen packages of properties to be carried under the contract, and the defendants put them in a van specially reserved for the plaintiff, which van had tied on to it some labels bearing the words: "Through to Bolton." None of the plaintiff's packages were addressed to Bolton. Some had no labels on at all, while others bore old labels for carriage to Bath, Scarborough or Newcastle. The route from Llandudno to Bolton goes through Chester and Manchester. The defendants' inspector at Manchester was duly advised by telegram that there was a van for Bolton on the train, but unfortunately he misread the telegram and then put it in his pocket and forgot all about it. Before the train reached Manchester the tie-on labels showing that the van was for Bolton had by some unexplained means got detached, and on its arrival at Manchester the defendants' inspector, not knowing the destination of the van, by mistake took it off the train and removed the plaintiff's packages. Those which bore no address, six in number, he put into the cloakroom, and those which bore old labels he sent off to the destinations thereby respectively indicated, some to Bath, some to Scarborough, and others to Newcastle. The result was that the delivery of the packages at Bolton was delayed for some two days, whereby the plaintiff who had advertised a performance for the day succeeding that of his arrival at Bolton was unable to give it.

The plaintiff brought this action for damages for delay

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in delivery, and contended that the defendants were not excused by the provisions of the owner's risk note, as those provisions only applied where the delay occurred during a portion of the agreed transit, whereas here the delay was caused by the packages being sent on wholly different routes. The county court judge found that the inspector at Manchester blundered honestly and did not act wilfully or recklessly in doing what he did. He also held that there was no evidence of the van labels having been wilfully detached, or of wilful misconduct in any other respect by the defendants' servants. He held that "the delay did not originate whilst the goods were being carried on a substituted route or by a substituted method of conveyance but in a mistake, or in mistakes, made at or before Manchester, whilst the contract was being performed in the stipulated manner." He accordingly gave judgment for the defendants. On appeal the Divisional Court (Lush and Greer JJ.) held that as the defendants' servant intentionally sent the goods to places which were in fact not upon the contract route the defendants were not relieved from liability by the terms of the contract.

The defendants appealed.

Barrington-Ward K.C. and *Beresford* for the defendants. The defendants are excused for the delay by the terms of the consignment note. The cause of that delay was a "misconveyance . . . . during a portion of the transit." A carrier misconveys goods when he causes them to be conveyed either on a wrong route or in a wrong manner. Here the plaintiff's packages were conveyed on a wrong route as the result of the inspector's order given at Manchester, and Manchester was on the contract route. It was at that place that the contract of carriage was broken. What happened afterwards no doubt aggravated the loss, but when considering the locus of the misconveyance you must look at the place where the breach of contract began. Suppose the goods had been left on a siding for a week that would have come under the head of misconveyance, and no distinction could be drawn between that case and this. No doubt in order to bring a conveyance

to stations off the contract route within the exception the order for that misconveyance must be given "during the transit." If the defendants here had started wrong and despatched the goods to Birmingham instead of Bolton so that they would never have gone on the contract journey at all, they would not have been protected. But if while performing the contract they by mistake divert the goods in a wrong direction they are protected. That is the distinction between this case and *Mallet* v. *Great Eastern Ry. Co.* (1) There fish was delivered at Lowestoft to the defendants to be carried on their railway to London and thence by the Great Western via Weymouth to Jersey on the terms of an owner's risk note, which was in the following form (2): "To be carried at the reduced rate below the company's ordinary rate, in consideration whereof I agree to relieve the Great Eastern Railway Co. and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss etc. arose from wilful misconduct on the part of the servants of the company, or of such other companies or persons as above." The Court held that the defendants were not protected. But there the mistake by which the fish was sent on a wrong journey was made before the transit had begun, by wrongly filling up the waybill at Lowestoft. That was the ground on which Kennedy J. distinguished that case in *Foster* v. *Great Western Ry. Co.* (3) There the plaintiff delivered fish to the defendants to be carried at owner's risk via Exeter and Southampton to Jersey. On reaching Exeter the fish ought to have been transferred to the Southampton train. By mistake it was left in the van and allowed to go on to Taunton. It was thereby delayed in delivery and the plaintiff suffered loss. The Court held the defendants were relieved from responsibility by the conditions of the owner's risk note (4), Kennedy J.

(1) [1899] 1 Q. B. 309.

(2) See report in 68 L. J. (Q. B.) 256.

(3) [1904] 2 K. B. 306.

(4) The form of the owner's risk note in this case, as also in *Gunyon's Case*, infra, was the same as in *Mallet's Case*.

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going upon the ground that "the damage arose by reason of an error committed on the contract route." The other case upon which the Divisional Court here relied was *Gunyon* v. *South Eastern Ry. Co.* (1) where fruit was consigned for carriage from Sittingbourne to Glasgow on the terms of an owner's risk note in the same form as that in *Mallet's Case* (2) to be carried as perishable merchandise by passenger train at the rates specified in Part 5 of the company's private Act. In the course of the journey the defendants transferred the fruit to a goods train, whereby its delivery was delayed. The company was held liable. But there, as Sankey J. pointed out, they deliberately substituted a wholly different contract for that agreed upon, relegating the goods to a different class of traffic for which entirely different rates were chargeable. There is nothing of that kind here, where the cause of the delay was a pure mistake. Moreover there the exception did not include "misconveyance." If it had the defendants might have succeeded.

[SCRUTTON L.J. I see that in the Oxford Dictionary the word "misconveyance" does not occur, while the only meaning given to the verb "misconvey," which is stated to be "Now rare," is "To convey a wrong impression of one's meaning," and the substantive "misconveying," stated to be obsolete, is interpreted to mean "mismanagement."]

The defendants also rely on the word "delay" in the exception. That delay like the misconveyance must be referred back to its cause—namely, the order of the inspector which was given at Manchester during the transit. The county court judge expressly found that the delay originated "whilst the contract was being performed in the stipulated manner." With respect to the six parcels which bore no labels the defendants are entitled to be excused under the word "misdelivery." The placing of them in the cloakroom at Manchester was a misdelivery within the meaning of the exception.

Hollis Walker K.C. and *Elkin* for the plaintiff were not called upon.

(1) [1915] 2 K. B. 370. (2) As to which see above.

BANKES L.J. Apart from previous authority upon more or less similar provisions in contracts of railway carriage I should have thought that there was no real difficulty about the decision which we ought to arrive at in this case. [His Lordship stated the facts as above set out.] The defendants contracted to convey these goods from Llandudno to Bolton by a specified route, and they endeavoured to protect themselves in certain events. I think the law is quite plain that if a carrier desires to exempt himself from his common law liability he must do so in clear language, and that in my opinion the defendants did not do here. And secondly as the contract had reference to the conveyance by the prescribed route and by that route alone, when once the goods were diverted by the defendants from the prescribed route and taken on another journey, even though that diversion was the result of a pure mistake on the part of their inspector, they ceased to be covered by the contract and by the exceptions which it contained. That I understand is the view taken by Greer J. in the Court below, and he always expresses himself so clearly that I should like to read what he says upon the point, because I entirely agree with it. He says (1): "It seems to me in these circumstances that if one were not troubled by the authorities it would be only good sense to say that the stipulations which had been inserted in the contract for the defendants' protection on the assumption that the goods would travel via Manchester to Bolton would have no application to the journeys that these goods performed by being sent to different distant towns and then returned from thence to Bolton. The plaintiff, in my opinion, had never agreed that the defendants' responsibility should be limited by the terms of this contract upon a journey of the sort upon which they were actually sent after they arrived in Manchester. For myself, where goods have been intentionally sent upon a journey not covered by the contract, I have a difficulty in seeing it can make any difference as regards the liability of the railway company whether they were started on a wrong journey immediately after they were delivered to the company

(1) [1921] 3 K. B. 224.

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BANKES L.J.

or were diverted on to a wrong route after they had arrived at an intermediate station. It seems to me that in both cases the company have equally failed to perform the service in respect of which the limitation of liability was agreed to by the consignor." With every word of that statement I entirely agree. I will now proceed to deal with the argument that has been addressed to us with reference to the interpretation to be put upon the exceptions. The defendants place especial reliance on the words "misconveyance" and "misdelivery," and say that the plaintiff's damage was caused by the fact that his goods had been misconveyed or misdelivered during the transit. But I ask By what possible construction can you bring the facts of this case within those terms? First was there any misdelivery of the goods during a portion of the transit? It seems to me, with all respect to what was said by Lord Alverstone in *Foster* v. *Great Western Ry. Co.* (1), that it is not possible to apply the expression "misdelivery" to what occurred here. It was not a misdelivery for the inspector to cause certain of the parcels to be placed in the cloakroom, nor was it a misdelivery to transfer the other parcels into the vans in which they were respectively conveyed to Bath, Newcastle and Scarborough. In neither case was there any delivery at all. Then was there a "misconveyance"? As Scrutton L.J. has pointed out, that is not a word which is to be found in any recognized dictionary, though possibly it may have a meaning among railway officials as applicable to such facts as those which occurred in *Gunyon* v. *South Eastern Ry. Co.* (2) It may be that if goods which are entrusted to a railway company for carriage by passenger train are in fact carried by goods train that might be called a misconveyance. But to say that a wrong order given by an inspector as to the ultimate destination of the goods is a misconveyance of them seems to me to be extending that expression to something which it is quite inapt to cover. "Misconveyance" must have reference to an act of conveyance, and cannot mean the order which results in the goods being conveyed to a particular

(1) [1904] 2 K. B. 306. (2) [1915] 2 K. B. 370.

place. It is the act of conveying them to the wrong place, not the order, that constitutes the misconveyance. Therefore, apart from authority, I do not think the defendants can bring the facts within either of the exceptions on which they seek to rely. Then as to the authorities. There are three of them : *Mallet* v. *Great Eastern Ry. Co.* (1) in 1899; *Foster* v. *Great Western Ry. Co.* (2) in 1904; and *Gunyon* v. *South Eastern Ry. Co.* (3) in 1915. The first thing to be noticed about all three of those cases is that the exceptions are not quite in the same form as those in the present case. The words " during any portion of the transit " do not occur in the same context. In those earlier cases the clause runs : " I agree to relieve the —— railway company and all other companies or persons over whose lines the merchandise may pass or in whose possession the same may be during any portion of the transit from all liability for loss " etc. Whereas here the clause runs : " I agree to relieve you from all liability for loss etc. during any portion of the transit." With regard to the former I entirely agree with what Wills J. said in *Foster's Case* (2)—namely, that the words " during any portion of the transit " are used " to describe and particularise the companies which are entitled to proteetion." Here those words are used with reference to the route and manner of the agreed transit. In *Mallet's Case* (1) the contract was for the carriage of fish from Lowestoft to London and thence via Weymouth to Jersey by the Great Western. The defendants in fact sent the fish from Lowestoft to London, but by mistake forwarded it from thence by the South Western via Southampton, with the result that there was considerable delay. Day J. said (4): "The delay referred to in the consignment note is a delay in the performance of the contract. But that is not this case. Here the delay arose in consequence of the defendants doing something which was wholly at variance with the contract." *Gunyon's Case* (3) was decided on exactly the same grounds. There fruit was consigned for carriage from Sittingbourne to Glasgow by passenger train. It was properly

(1) [1899] 1 Q. B. 309.
(2) [1904] 2 K. B. 306.
(3) [1915] 2 K. B. 370.
(4) [1899] 1 Q. B. 311.

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carried by passenger train as far as London, but by mistake it was carried from there by a goods train. The Court held that that was a form of conveyance to which the contract and the exceptions in it did not apply. With regard to *Foster's Case* (1) it is said that the facts there were indistinguishable from those in the present case, and that if the decision in *Foster's Case* (1) was right the decision of the Divisional Court in the present case must be wrong. Mr. Beresford particularly insisted upon the finding of the county court judge that the delay did not originate whilst the goods were being carried on a substituted route, and contended that that finding brought him within the reasoning upon which *Foster's Case* (1) was decided. It is necessary therefore to consider whether *Foster's Case* (1) was rightly decided. In my opinion it was not. In that case fish was consigned from Brixham to Jersey via Southampton, and in the course of that journey it had to go to Exeter, where it ought to have been transhipped and taken on by the South Western Railway to Southampton. By mistake it was not taken out of the train at Exeter and was carried on by the Great Western to Taunton, with the result that the delivery was much delayed. The defendants relied on the exceptions, which covered "loss damage misdelivery delay or detention." Lord Alverstone treated the case as one of misdelivery, and said that "that misdelivery happened upon a route that was contemplated by the parties." With great respect to the learned judge I cannot accept that as a correct interpretation of the word "misdelivery," and if, as I read it, his judgment is founded on that interpretation I cannot agree with it. Wills J. though he agreed that the action of the railway company at Exeter was covered by the language of the exception did not state his reason for coming to that conclusion, but presumably accepted the view of the Chief Justice that what took place amounted to a misdelivery. Then Kennedy J. speaking of *Mallet's Case* (2) said: "It seems to me that very different considerations apply to this case and to that. Those considerations sufficiently appear by the headnote, which is

(1) [1904] 2 K. B. 306, 309, 311. (2) [1899] 1 Q. B. 309.

obviously correct, that in that case it was in consequence of the railway company's having sent the goods by a different route to that agreed upon that the damage arose. Here the damage arose by reason of an error committed on the contract route." With great respect to the learned judge it does not appear to me that an error so committed comes within the exception if the result is that the goods are despatched upon some other journey than that contracted for. For these reasons I think that *Mallet's Case* (1) and *Gunyon's Case* (2) are to be preferred to *Foster's Case* (3), and as they are not reconcilable *Foster's Case* (3) ought to be overruled. In my opinion the decision of the Divisional Court in the present case was right, and the appeal must be dismissed.

SCRUTTON L.J. I agree. I decide this case on two broad principles of great importance in all these contracts of carriage, first, that when a carrier seeks to protect himself by exceptions, unless they are so worded as to indicate clearly a contrary intention, they only apply where the excepted events happen in the course of his carrying out the contract, and do not apply where they happen while he is doing something which he has not contracted to do. An illustration of that principle is to be found in the well-known case of *Lilley* v. *Doubleday* (4), where the defendant, who had contracted to store goods in warehouse A, stored them in warehouse B, where they were accidentally destroyed by fire; and it was held that he was liable for their loss, although he would not have been liable if he had stored them in the warehouse contracted for and they had been destroyed there by a similar cause. By departing from his contract he lost the benefit of the protection. That is I think the principle which Greer J. stated in his judgment in this case, which Sankey J. stated at the end of his judgment in *Gunyon's Case* (2), and which I had occasion to state in *Gibaud* v. *Great Eastern Ry. Co.* (5) The second principle is that if a carrier wishes to protect

(1) [1899] 1 Q. B. 309.
(2) [1915] 2 K. B. 370.
(3) [1904] 2 K. B. 306, 309, 311.
(4) (1881) 7 Q. B. D. 510.
(5) [1920] 3 K. B. 689.

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himself from liability for the negligence of his servants he must do it in clear and unambiguous language. Now the exception relied on here is in somewhat different terms to those in question in the previous cases. The words "during any portion of the transit" occur in the passage limiting the liability of the railway company for loss damage etc. That was not so in the previous cases. There is also this further difference. Some ingenious person, I suppose with the object of meeting *Gunyon's Case* (1), thought it advisable to put in the word "misconveyance," which was not to be found in the exceptions in the earlier cases. Now that word "misconveyance" is a word which I do not find in the recognized dictionary. I never heard it before. And if the defendants want to protect themselves against the negligence of their servants they must use ordinary English and not invented words of doubtful meaning. What happened here was that the defendants, having contracted to carry the goods from Llandudno to Bolton via Manchester, sent some of them to Bath and others to Newcastle and Scarborough. To say that in so doing they were misconveying them would to my mind be a ridiculous abuse of language. Nor in my opinion is the word "misdelivery" an appropriate word to apply to the present facts. I cannot understand how Lord Alverstone in *Foster's Case* (2) took the view that letting the fish remain in the train that was going on to Taunton was misdelivering them. The company there did not by so doing deliver the goods to anybody, for they remained in their own possession. Misdelivery means a delivery to a wrong person, and if you keep the goods yourself you do not deliver them at all. I find it impossible to see that anything that was done during the transit here can bring the defendants within the exceptions, or excuse them for a delay which resulted from their carrying the goods to various places altogether outside the route contracted for. I decide this case, first, on the ground that the exceptions in the defendants' consignment note do not apply while they are doing something wholly different from what they had contracted to do, and, secondly, that although

(1) [1915] 2 K. B. 370. (2) [1904] 2 K. B. 306.

they might use exceptions which would free them from liability whatever they were doing, if they want to protect themselves from the consequences of their own negligence they must do it in clear and intelligible language, and that is what they have not done in the present case. It follows from what I have said that I think the decision in *Foster's Case* (1) was wrong. There the fish was to go from Brixham to Jersey, by going first to Exeter, then being transhipped there to the South Western line for Southampton, and going on by the morning Southampton steamer to Jersey. What happened was this, when the fish got to Exeter it was not taken off the train, which went on in the ordinary way to Taunton. Then the company finding that they had got some fish on the train which ought to have been transhipped at Exeter, thought that, instead of sending it back to Exeter and thence to Southampton, they would save time if they sent it by their own line to Weymouth, which was quite a different journey altogether, with the result that it only caught the afternoon steamer at Weymouth and arrived at Jersey half a day late. That seems to me a clear case of a departure from the contract journey, and consequently I think that the exceptions did not apply at all. Lord Alverstone seems, as I have said, to have treated the case as if there was a misdelivery at Exeter, and, inasmuch as Exeter was on the contract route, as though an event had consequently happened on the contract route which excused the delay. But, as I have already said, merely allowing the fish to remain in the train cannot be said to be a misdelivery. It was nevertheless the groundwork of Lord Alverstone's judgment. For these reasons I think that *Foster's Case* (1) can no longer be treated as an authority. I agree that the appeal should be dismissed.

ATKIN L.J. I agree. I think it would probably be sufficient for the disposal of this case to say that if the railway company take money from a member of the public to convey his goods from Llandudno to Bolton, and wish to exempt themselves from liability if, instead of conveying them to

(1) [1904] 2 K. B. 306.

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Bolton, they by mistake convey them to Bath, they must use perfectly plain language in their contract to show that they are so exempting themselves; and that in this case the words used by the railway company are very far from clear, for to say that they will not be liable for "misconveyance during any portion of the transit" is to use language which would not convey to any ordinary person that they were reserving to themselves a freedom from responsibility for any resulting damage in the event of their carrying the goods to Bath or Newcastle. That is one ground on which I think this case could be decided, but I do not rely upon that ground alone. I think it could also be decided upon the other ground, that these exceptions do not apply unless the goods are being carried on the journey stipulated for. That is only an instance of a principle which, as I said in *The Cap Palos* (1), to which I was a party in the other division of the Court of Appeal quite recently, has been applied to contracts of carriage by sea, by river, by land, contracts of marine insurance, and contracts of bailment. It appears to me plain that these exceptions were intended to protect the railway company only while performing a contract, the essence of which was that the goods should be conveyed by the usual route from Llandudno to Bolton, and were not intended to protect them when in fact they conveyed the goods, whether through the negligence of their servants or not or however the mistake may have arisen, from Llandudno to Bath or Llandudno to Newcastle. And when one considers the principle of the thing it can make no difference in my opinion whether the goods have been sent upon a wrong route from the very outset, or having started upon the contemplated route have been diverted from that route at some intermediate point. It makes, certainly, no difference to the other contracting party, and I can see no reason for its making any difference in law. Suppose goods are consigned, say from Gravesend to Newcastle, it appears to me ridiculous to suppose that it can make any difference whether the goods are properly sent to London and thence sent to Penzance, or when starting from Gravesend

(1) [1921] P. 458.

are sent to Penzance by a route which does not include London in its course. In either case the goods are not carried on the contract route, and that is of the essence of the contract. It appears to me that for loss or damage happening under those circumstances the railway company are not protected by ordinary exceptions such as those which we have to deal with in the present case.

For these reasons I think that the appeal should be dismissed, and I should like to add that I agree with my brothers that *Foster* v. *Great Western Ry. Co.* (1) was wrongly decided.

Appeal dismissed.

Solicitor for the railway company: *H. L. Thornhill.*
Solicitors for the plaintiff: *A. De Freece & Co.*

J. F. C.

COMMISSIONERS OF WORKS *v.* HULL.

1921
Nov. 25.

Landlord and Tenant—Breach of Covenant not to assign—Option of Landlord to forfeit—Action by Landlord against Assignee in Possession—Exercise of Option.

The tenant of the plaintiffs, in breach of a covenant not to sub-let or assign without their written permission, assigned his tenancy to the defendant, and subsequently disappeared. On discovering the facts the plaintiffs brought an action against the defendant to eject him as a trespasser:—

Held, that the proceedings, although taken against the assignee, and not against the original lessee, were a sufficient indication by the landlords of their intention to exercise their option to forfeit the tenancy for the breach of the covenant not to assign, and that the tenancy of the original lessee, and, consequently, that of the defendant, was thereby determined.

APPEAL from Greenwich County Court.

The plaintiffs were the owners of the Well Hall Estate, Eltham, which was administered for them by the London County Council. On April 1, 1918, they let a dwelling house on the estate, 14 Lovelace Green, to one Stacey at a

(1) [1904] 2 K. B. 306.

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rent of 12*s.* 6*d.*, subsequently raised to 18*s.* 6*d.* per week, subject to the following conditions: "(3.) No tenant shall underlet or take in lodgers without the express authority in writing of the housing manager being first obtained . . . . or assign this agreement." "(12.) In case of breach by the tenant of any of these regulations, the housing manager may determine the tenancy summarily at any time." Up to May, 1921, Stacey remained in occupation, but on calling for the rent on May 21 the collector found the defendant Hull in occupation. The latter tendered rent, but it was not accepted. The case was tried on the footing that the defendant was an assignee. The plaintiffs had not heard of Stacey since, and no notice to quit had been served on him. No authority to underlet or to assign the agreement had been given by the plaintiffs. In July, 1921, the plaintiffs issued a plaint against the defendant in the Greenwich County Court under s. 59 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), claiming to eject the defendant "as a trespasser." The county court judge held that the defendant was not a trespasser and said that the plaintiffs had misconceived their remedy, and gave judgment for the defendant.

The plaintiffs appealed.

Clement Davies for the plaintiffs. The county court judge thought he was bound by the case of *Parker* v. *Jones* (1); but in that case the tenant, who had sub-let to the plaintiff in breach of his covenant and without his landlord's knowledge, had subsequently surrendered his tenancy to the landlord; the latter, therefore, could only take what was surrendered—namely, the tenancy, subject to the plaintiff's sub-tenancy. In the present case, when Stacey assigned, the plaintiffs had the option of forfeiting the tenancy, and the bringing of these proceedings was a sufficient indication of their intention to forfeit: *Serjeant* v. *Nash, Field & Co.* (2)

[SHEARMAN J. Even though brought not against the lessee but against the assignee?]

(1) [1910] 2 K. B. 32. (2) [1903] 2 K. B. 304.

Yes, for the plaintiffs are entitled to assert their right against the person in possession. It would be a useless proceeding to issue a writ against a person not in possession. The plaintiffs did all they could do except to take physical possession: per Collins M.R. in *Serjeant's Case.* (1) It was not necessary to communicate to Stacey their intention to forfeit. That is a question of evidence, and omission to so communicate is only some evidence that they had not elected to forfeit.

Berryman for the defendant. To operate as an exercise of the option the proceedings should have been instituted against Stacey; an order for substituted service could have been applied for. The proceedings were misconceived. Although the sub-letting was in breach of the covenant, the term passed to the defendant, and the plaintiffs should have brought their action against the defendant as assignee for recovery of possession under s. 138 of the County Courts Act, 1888, and not in ejectment against him as a trespasser under s. 59. Had they done so defences under the Increase of Rent, &c. (Restrictions), Act, 1920 (10 & 11 Geo. 5, c. 17), would have been open to the defendant.

No reply was called for.

SHEARMAN J. This is a curious case. The plaintiffs, the London County Council, acting through a committee, let some rooms to one Stacey, and there was in the agreement a covenant that Stacey should not underlet or assign without the express authority in writing of the housing manager, with a right of forfeiture if that was broken. The plaintiffs brought an action for ejectment, not against Stacey but against a man named Hull, the defendant, who was found in possession of the premises. The case was conducted on the footing that Hull was an assignee. No reference was made in the county court to the Rent Restrictions Act or to any of the defendant's rights as an assignee under the Act, if he had any, and therefore no question arises on that. The defendant contended in the county court that as assignee he

(1) [1903] 2 K. B. 304, 310.

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Shearman J.

came lawfully into possession. It is well settled law that even though it be contrary to his covenant a lessee can let and the tenant becomes his lawful tenant. As soon as the letting is known to the landlord he has an option to put an end to the tenancy, and thereby put an end to the tenancy growing out of it; but until he does so the original tenant is the lawful tenant. The case of *Parker* v. *Jones* (1) was cited to the county court judge, who thought that it governed the present case. All that it decided was that where the immediate lessee of the landlord surrendered his tenancy, that did not put an end to the sub-tenancy. A person who surrenders is like a person who assigns; he must assign subject to any equities or tenancies created by himself. The present case is launched entirely on forfeiture, and the defendant seeks to uphold his judgment by saying that he might have succeeded on another ground. The difficulty is that Stacey has disappeared and the only evidence of the election of the plaintiff to determine Stacey's tenancy is the issue of the writ in this case. We have been referred to no case, and there does not seem to be any case which decides that on the disappearance of the tenant the issue of a writ against the person actually in possession is a sufficient declaration by the landlord of the exercise of his option. It is well decided since *Serjeant* v. *Nash, Field & Co.* (2) that the best and most irrevocable indication of an intention to claim a forfeiture is the issue of a writ. I think it follows from the judgment in that case that the issue of a writ against the person claiming to be the lawful sub-tenant is also a sufficient indication. Collins M.R., referring to the judgment of Willes J. in *Grimwood* v. *Moss* (3), said (4): "The learned judge [Willes J.] added (5), with reference to the case of *Jones* v. *Carter* (6): 'I entirely agree that the true principle upon which that decision was founded was, that the bringing of the action of ejectment is equivalent to the ancient entry.'" I do not think it follows necessarily from that that the action must be

(1) [1910] 2 K. B. 32.
(2) [1903] 2 K. B. 304.
(3) (1872) L. R. 7 C. P. 360.
(4) [1903] 2 K. B. 304, 311.
(5) L. R. 7 C. P. 362, 364.
(6) (1846) 15 M. & W. 718.

against the original tenant, for it would be a vain proceeding if he is out of possession and does not claim to be in. I think it is sufficient to bring an action of ejectment against the person claiming to be in possession under the lessee who has gone out. It has been suggested in one text-book that the intention to exercise the option must be communicated to the tenant, and *Jones* v. *Carter* (1) is cited for that proposition. Parke B. there says (2): "Without inquiring whether an ejectment be a real action, the bringing of which and the counting in which would, according to the authority of Lord Coke, be a determination of an election between two remedies, it seems to us that so distinct and unequivocal an act must, independently of any technical reason, be a final determination of the landlord's option; for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease." Those words equally apply to an action of ejectment or recovery of possession against the assignee of the lessee if in possession. Parke B. says just before the above passage: "We think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option." I think that the whole meaning of that is that it is sufficient if you serve it, not on the original lessee but on the under-lessee who claims to be in possession under the lessee, because that is simply a peaceable means of effecting re-entry. It follows that there is a forfeiture and that the defendant had no right to remain on the premises, and this appeal must be allowed with costs.

SALTER J. I am of the same opinion. I think the county court judge was in error in supposing that the judgment in *Parker* v. *Jones* (3) entitled the defendant to succeed. In that case the lessee of a field sub-let on a weekly tenancy to the plaintiff, in breach of the terms of the lease, and thereby entitled the lessor to forfeit the lease if he thought fit to do so.

(1) (1846) 15 M. & W. 718. (2) Ibid. 726.
(3) [1910] 2 K. B. 32.

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In fact the lessor was unaware of what the lessee had done, and did not therefore forfeit the lease. The lessee having without the lessor's knowledge created this sub-tenancy, surrendered his interest to the lessor. He could only surrender the interest which he had, that is to say his reversion expectant on the determination of the plaintiff's tenancy. The plaintiff's interest in the land therefore remained. The lessor, in ignorance of the plaintiff's tenancy, granted a lease of the land to the defendant, who, finding the plaintiff's cattle there, drove them off. The plaintiff sued the defendant for possession of the field and for damages for trespass to his land and cattle, and he succeeded. It was clear enough that the plaintiff's interest in the land had never come to an end, and he was therefore entitled as against the defendant to possession of the field. If the lessor had learned what was done and had chosen to determine the lease, then no doubt the interest of the plaintiff would have come to an end at the same time; but that was not what happened. We must certainly deal with this case upon the footing that the defendant is an assignee of Stacey's interest. The plaintiffs, therefore, had a right to determine the tenancy and they have taken the proper steps to do so, and are entitled to possession of the premises.

Appeal allowed.

Solicitor for plaintiffs: *Treasury Solicitor.*
Solicitor for defendant: *F. J. Berryman.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1921
Nov. 25.

HARRISON *v.* HOLLAND AND HANNEN AND CUBITTS, LIMITED.

[1921. H. 1910.]

Vendor and Purchaser—Part Payment of Purchase Price—Vendor's Claim to retain Part Payment as Security for Loss on Resale.

By a contract for the sale of real property it was provided that the purchaser should, within fourteen days after signing the contract, pay to the vendors a certain sum as part payment of the purchase price, but that such sum should not be forfeited if the purchaser failed to complete. It was also provided that if the purchaser made default, the vendors might resell and recover from the purchaser, as liquidated damages, any loss resulting from resale. The purchaser paid the said sum to the vendors but made default in completion, whereupon the vendors endeavoured to resell the property, but without success. The purchaser then sued to recover back the sum so paid as part of the purchase price as having been paid on a consideration which had failed, and was met by a claim on the part of the vendors to retain the amount for a reasonable time as security for any loss they might sustain on the resale of the property :—

Held, affirming the judgment of Lush J., that the Court could not read into the contract by implication a term that the money might be retained for the purpose suggested, and that upon the cancellation of the contract the purchaser was entitled to recover it back.

APPEAL from the judgment of Lush J. (1)

By a contract dated March 29, 1920, the defendants agreed to sell the premises known as Devonshire House, in Piccadilly, to Messrs. Barley and Sibthorp for the sum of 1,050,000*l.* By that contract it was provided that the purchasers should pay 50,000*l.* as a deposit and a further sum of 100,000*l.* on account of the purchase price; and, by clause 20, that "if the purchasers fail to comply with the stipulations hereof their deposit of 50,000*l.*, but not the said sum of 100,000*l.*, shall be forfeited, and the vendors may resell the property in such manner as they think fit, and any deficiency arising on the resale and all expenses attending the same or any attempted resale shall be paid by the purchasers to the vendors as liquidated damages." The purchasers paid the said two

(1) [1921] 3 K. B. 297.

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sums, but made default in completion, whereupon the vendors on December 22, 1920, forfeited the deposit of 50,000*l.* and endeavoured to resell the property, but without success. On March 2, 1921, Barley and Sibthorp assigned to the plaintiff their right to recover the sum of 100,000*l.*, and gave notice of such assignment to the defendants. On May 3, 1921, this action was brought on a specially indorsed writ to recover the 100,000*l.*, as having been paid on a consideration that had wholly failed. On an application by the plaintiff for summary judgment under Order XIV. the defendants claimed a right to resell the property and to retain the 100,000*l.* for a reasonable time as security against a loss on such resale. The action was remitted to the short cause list. Lush J., before whom it was tried, was of opinion that if the defendants were entitled to retain the money for a reasonable time after December 22, 1920, pending further endeavours to resell, a reasonable time had not elapsed; but he held that they were not so entitled, but were bound to return the 100,000*l.* immediately upon the rescission of the contract, and gave judgment for the plaintiff. The defendants appealed.

Upjohn K.C. and *C. A. Bennett* for the defendants. The parties must have had some reason for stipulating that the 100,000*l.* should be paid shortly after the signing of the contract, and as it was not to be forfeited the only possible inference is that it was intended to be retained by the vendors for a reasonable time as security against loss in the event of the purchasers' default, and if that was the intention of the parties the Court ought to imply a term in the contract which will carry it out. It is not suggested that the defendants can retain the money indefinitely, but only for a reasonable time, and as the judge has found that a reasonable time had not expired when the writ was issued, the action was premature.

Maugham K.C. and *Sir Albion Richardson* for the plaintiff were not called upon.

BANKES L.J. This 100,000*l.* which the plaintiff seeks to recover was stated in the contract to be payable in advance

on account of the purchase price. If nothing more had been said about it, as the contract came to an end in consequence of the purchasers' own default, neither they nor their assignee would have been able to get the money back. But it is expressly provided that it is not to be forfeited. It is said however that although it was not to be forfeited the parties must have meant something by the provision that it should be prepaid before completion. It is suggested that the money was intended to be retained for a limited time as security against loss in the event of default, and we are asked to imply a term in the contract to that effect. I do not think that it is material for us to inquire into the precise reason for which the vendors insisted on having this 100,000*l.* prepaid, but I am clear that we should not be justified in reading into the contract such an implied term as that suggested. Then if no such term is to be implied, and the money is not forfeitable, the contract having come to an end, the vendors must hold the money to the use of the plaintiff as having been paid on a consideration which has failed. The appeal must be dismissed.

SCRUTTON L.J. The question in this case turns on the construction of this particular contract, and does not involve any question of general law. We are asked to imply in this contract a term that the vendors shall be at liberty to retain the money for a reasonable time as security. But the Court cannot read a term by implication into a contract unless it is necessary to do so in order to carry out the obvious intention of the parties. Here I cannot see that it is necessary that such a term should be implied. I agree that the appeal fails.

YOUNGER L.J. concurred.

Appeal dismissed.

Solicitors for the defendants: *Leighton & Savory.*
Solicitors for the plaintiff: *Wadeson & Malleson.*

J. F. C.

1921
Oct. 14.

MARGERISON *v.* E. HIND AND COMPANY, LIMITED.

Children—Employment—Prohibition of Employment—Resolution of local Education Authority—Alleged Contravention—Summary Proceedings—Report of Medical Officer—Production by local Authority—Employment of Children Act, 1903 (3 *Edw.* 7, *c.* 45), *ss.* 5, 6—*Education Act*, 1918 (8 *& 9 Geo.* 5, *c.* 39), *s.* 15, *sub-s.* 1; *s.* 16 (*b*).

The Education Act, 1918, s. 15, sub-s. 1, provides: "The local education authority, if they are satisfied by a report of the school medical officer or otherwise that any child is being employed in such a manner as to be prejudicial to his health or physical development, or to render him unfit to obtain the proper benefit from his education, may .... prohibit .... his employment in that or any other manner. ...."

Pursuant to that sub-section a local education authority passed a resolution which stated that they, being satisfied by a report of the school medical officer that a certain child was being employed in a manner prejudicial to his health and physical development, thereby prohibited his employment; and notice of the resolution was served upon the employers of the child. At the hearing by justices of an information at the instance of the authority against the employers for an alleged contravention of the Act in employing the child contrary to the resolution, the justices required the authority to produce the report mentioned in the resolution or other evidence upon which they had acted in passing the resolution, but the authority refused to do so, and the justices thereupon dismissed the information. On a case stated by the justices:—

Held, that the justices were entitled to require the authority to produce the report or other evidence upon which they had relied, and that on their failure to do so the justices had rightly dismissed the information.

CASE stated by justices for the West Morley division of the West Riding of Yorkshire.

The appellant, William Margerison, an inspector under the Employment of Children Act, 1903, laid an information against the respondents, E. Hind & Co., Ld., under s. 5 of that Act, charging that the respondents, on December 14, 1920, unlawfully employed a certain child, to wit Stephen Fry, in contravention of the Act, in that, having received notice of a prohibition as to his employment issued by the local education authority under the Education Act, 1918, they employed him in contravention of that prohibition.

At the hearing of the information before the said justices on January 8, 1921, the following facts were admitted or proved:—

On October 26, 1920, the said authority passed the

resolution: "That the local education authority being satisfied by a report of the school medical officer that S. Fry and C. Green, being children within the meaning of s. 15 of the Education Act, 1918, are being employed in such a manner, to wit, as doffers in spinning, as to be prejudicial to their health and physical development, hereby prohibit their employment as doffers in spinning or in any other manner." On October 27, 1920, notice of the resolution was served upon the respondents. The said S. Fry was a child within the last-mentioned section, and resided within the area of the said authority, and attended one of their schools.

On December 14, 1920, S. Fry was employed by the respondents at their mills in the said division as a doffer in spinning. The said S. Fry was on all the above dates an exceptionally strong and perfectly healthy boy of nearly thirteen years of age, and his said employment could not be and was not prejudicial to his health or physical development.

The appellant's solicitor refused to comply with letters dated January 3 and 4, 1921, from the respondents' solicitors asking for inspection of, and giving notice to produce at the hearing, the said report of the medical officer. At the hearing counsel for the respondents applied for production and inspection of the report, and the justices held that they should have medical evidence before them, and that the report should be produced, whereupon the appellant's solicitor stated that he was not in a position to produce any medical evidence.

It was contended for the respondents that the resolution and the notice thereof were ultra vires and invalid in law in that (*a*) the resolution and notice purported to prohibit the employment of S. Fry "as a doffer in spinning or in any other manner," whereas the said authority were stated to have been satisfied only that his employment as a doffer was prejudicial to his health and physical development, (*b*) the prohibition against the employment of S. Fry in "any other manner" was not justified by s. 15, sub-s. 1,

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of the Act of 1918 (1), and that the words "or any other manner" in that section mean in any other specified or particular manner or manners; and it was also contended for the respondents that on the hearing of the information production of the said report could be required and was material evidence as to the validity of the resolution and notice, and that medical and other evidence as to the fitness of S. Fry for his said employment or in any other capacity with the respondents was admissible.

It was contended for the appellant that the resolution and notice were not ultra vires, and that it was not necessary to adduce medical evidence or to produce the report, and that such evidence as that was inadmissible, the local education authority being the sole judges whether the child was being employed in such a manner as to be prejudicial to his health and physical development.

The justices, being of opinion that the resolution and notice were not ultra vires, but that medical evidence should have been adduced and the report produced by the appellant, dismissed the information.

The questions of law for the Court were: (1.) Whether the report of the school medical officer should have been produced. (2.) Whether the respondents were entitled to

(1) The Education Act, 1918, provides:—

Sect. 15: "(1.) The local education authority, if they are satisfied by a report of the school medical officer or otherwise that any child is being employed in such a manner as to be prejudicial to his health or physical development, or to render him unfit to obtain the proper benefit from his education, may either prohibit, or attach such conditions as they think fit to, his employment in that or any other manner, notwithstanding that the employment may be authorised under the other provisions of this Act or any other enactment."

Sect. 16: "If any person—

. . . . .

(*b*) having received notice of any prohibition or restriction as to the employment of a child issued by a local education authority under this Act, employs a child in such a manner as to contravene the prohibition or restriction; . . . .

he shall be deemed to have employed the child or young person in contravention of the Employment of Children Act, 1903, and sub-sections 1 and 2 of section five . . . . of that Act shall apply accordingly as if they were herein re-enacted and in terms made applicable to children and young persons within the meaning of this Act. . . . ."

call evidence to contradict that report. (3.) Whether the resolution and/or notice was valid.

Barrington-Ward K.C. (*Frank Beverley* with him) for the appellant.

The first of the questions raised by the special case—namely, whether the report of the medical officer should have been produced before the justices—ought to be answered in the negative. The justices had no power to require production of that report or of any other evidence upon which the local education authority acted. The Education Act, 1918, provides by s. 8, sub-s. 1, that subject as provided in the Act, no exemption from attendance at school shall be granted to any child between the ages of five and fourteen; by s. 15, sub-s. 1, that "the local education authority, if they are satisfied by a report of the medical officer or otherwise" that the child is employed in such a manner as to be prejudicial to his health or education, may prohibit his employment; and by s. 16 (*b*) that, if any person having notice of any prohibition as to the employment of a child by a local authority, employs a child in contravention of the prohibition he shall be deemed to have employed the child in contravention of the Employment of Children Act, 1903, and (inter alia) s. 5, sub-s. 1, of that Act is accordingly to apply as if it were re-enacted in, and made applicable to children within the meaning of, the later Act. The Act of 1903, s. 5, sub-s. 1, provides that if any person employs a child in contravention of that Act he shall be liable to a fine as therein provided. The scheme of the legislation is that every child up to the age of fourteen shall go to school and shall only be engaged in an employment in certain exceptional cases, and that the education authority shall be the only authority for determining whether a child should be employed. Under the provisions referred to, where the local education authority has passed a valid resolution prohibiting the employment of a child, and notice of the resolution has been served upon the employer, the latter by continuing to employ the child commits an offence against the Act, and on the

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hearing of an information charging him with the offence, the justices on proof of the resolution and of the contravention are bound to convict, and cannot require production of the medical report or other evidence which was before the authority. By s. 15, sub-s. 1, of the Act of 1918, it is the local authority, and not the justices or any other person, who are to be satisfied by the report of the medical officer or otherwise that the employment of the child is prejudicial. The question whether the employment is prejudicial to the child is a question for the determination of the authority alone, and the justices cannot substitute their determination for that of the authority. The authority have the exclusive right to say whether or not the child shall be employed, and when they have passed a resolution that he shall not be employed the justices have no jurisdiction to decide that he shall. Under the last-mentioned sub-section the authority are to be satisfied "by a report of the school authority or otherwise" that the employment is prejudicial to the child before prohibiting his employment. In the present case it was proved at the hearing before the justices that the local authority had been so satisfied. The resolution of the authority was produced which states upon the face of it that they had been satisfied by a report of the medical officer that the employment of the child was prejudicial, and no evidence was called on behalf of the defendants to show that the authority had not had a report or other sufficient evidence before them. The resolution itself proved in express terms that the authority in passing it had the requisite evidence before them. Even if the resolution had not expressly mentioned the report of the medical officer, production and proof of the resolution would, in the absence of any evidence to the contrary, have been proof by implication that the authority had acted upon a report of the medical officer or other sufficient evidence. Where the authority have passed a resolution valid on the face of it prohibiting the employment of a child, the presumption must be, until the contrary is proved, that they have satisfied themselves by a medical report or otherwise that the employment is prejudicial. The

onus is not upon the authority of showing that they had sufficient evidence to support the resolution, but upon the defendants to show that they had not. The reason why the report was not produced before the justices was not that it could not be produced, but that the authority objected on principle to the question whether the employment was prejudicial to the child being investigated by the justices. The appellants' solicitor did not refuse to produce any medical evidence, but only said that he was not in a position to produce any.

The second question—namely, whether the respondents were entitled to call evidence to contradict the report—should also be answered in the negative. The respondents had no right to call or the justices to hear evidence contradictory of the report. The finding of the justices that the child in question was strong and healthy was ultra vires and irrelevant.

The third question raised—namely, whether the resolution and notice were valid—should be answered in the affirmative, and the justices in so far as they answered that question in the affirmative came to a right determination.

Compston K.C., *Richard Watson*, and *G. Russell Vick*, for the respondents, were not called upon to argue.

LORD TREVETHIN C.J. In my opinion the answer to the first of the questions raised by the special case—namely, whether the report of the school medical officer should have been produced before the justices—should be in the affirmative. If that be the correct answer to the first question it is unnecessary to answer the other two questions raised by the case.

I may state shortly the grounds for my conclusion regarding the first question. Sect. 15, sub-s. 1, of the Education Act, 1918, provides that: "The local education authority, if they are satisfied by a report of the school medical officer or otherwise that any child is being employed in such a manner as to be prejudicial to his health or physical development, or to render him unfit to obtain the proper

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benefit from his education, may . . . . prohibit . . . . his employment in that or any other manner. . . . ." That subsection makes it a condition precedent to the passing of a resolution by the authority prohibiting the employment of a child, that they have been satisfied by a report of the medical officer or otherwise that the child is being employed in a manner prejudicial to his health or physical development or fitness to receive education. The Act does not, as the argument of counsel for the appellant suggests, give to the resolution of the education authority any peculiar force or sanctity precluding all inquiry as to its compliance with the requirements of the Act. When an information is laid before the justices for an alleged contravention of a resolution of this kind, the justices are neither entitled nor bound to hold that the resolution, merely because it has been passed by the authority, is necessarily sufficient under the Act. On the contrary they are entitled and bound to see that the condition precedent imposed by the subsection, to which I have referred, has been duly complied with, and that the authority before passing the resolution have been reasonably satisfied by a report of the medical officer or other evidence that the child is being employed in a manner prejudicial to his health or otherwise. There is no provision in the Act which empowers or requires the justices in such a case as this to convict the defendant if they are in doubt whether or not the condition precedent has been complied with.

It may well be that counsel for the appellant is right in saying that the question whether the child is being employed in such a manner as to be prejudicial to his health or physical development or to render him unfit to obtain the proper benefit from his education, is a question for the local education authority and not for the justices; but that is not to say that the justices are bound to treat the resolution of the authority as valid in the absence of evidence that the condition precedent has been fulfilled.

I do not at present say whether or not the justices can investigate for themselves the effect of the child's employment

upon his health or physical development and hear evidence regarding the matter. That is a question which is not here raised, and it would be premature now to decide that in every case, whatever its circumstances, the justices can inquire whether the employment is such as to be prejudicial to the child. Cases may arise in which it might be right that the justices should investigate the matter independently of the authority, but it does not appear that the present case is one of these.

Here the justices rightly required the authority to produce the evidence on which they acted in passing the resolution, and as the authority did not, and apparently could not, produce any evidence, the justices were entitled to dismiss the information.

SANKEY J. I agree. The special case raises three questions for the opinion of the Court. [His Lordship read the questions and continued :] As we have arrived at the conclusion that the first of these questions should be answered in the affirmative it is unnecessary at present to answer the second and third questions, and I desire to reserve my opinion regarding these questions until I have heard them further argued.

In order to answer the first question, regard must be had to s. 15, sub-s. 1, of the Education Act, 1918, which provides that the local education authority if they are satisfied by a report of the medical officer or otherwise that any child is employed in such a manner as to be prejudicial to his health or education, may prohibit his employment. The sub-section makes it a condition precedent to the passing of a resolution by the local authority that they should be satisfied by a report of the medical officer or otherwise that the employment of the child is prejudicial. In this case the authority passed a resolution which stated that they were satisfied by the report of the medical officer that the employment of the child was prejudicial, and an information was laid against the respondents, the employers of the child, for an alleged contravention of that resolution. The first

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question which the Court is asked is whether on the hearing of the information before the justices the report of the medical officer should have been produced. I am of opinion that the report should have been produced in order that the justices might be able to judge whether the condition precedent to the passing of the resolution had been properly fulfilled. I think that the decision of the justices on this point was right, and that the appeal should be dismissed.

ACTON J. I agree. *Appeal dismissed.*

Solicitors for appellant: *Torr & Co., for N. L. Fleming, Town Clerk, Bradford.*

Solicitors for respondents: *Kenneth Brown, Baker, Baker, for J. Wickstead Perkins, Bradford.*

J. R.

Observations of ATKIN, L.J., at p. 227, *explained.* SOLLE *v.* BUTCHER. [1949] 2 All E.R. 1107.

C. A.

1921

Oct. 21.

[IN THE COURT OF APPEAL.]

PHILLIPS *v.* BARNETT.

Emergency Legislation—Landlord and Tenant—Dwelling Houses—Conversion into Factory—Business Premises—Standard Rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1; *s.* 12, *sub-ss.* 1 (*a*), 6, 9.

When the Rent (Restrictions) Act, 1915, was passed there were three adjoining dwelling houses to each of which that Act applied. In 1918 the owner of the three houses converted them into one factory in such wise that the three houses ceased to exist as dwelling houses and were replaced by the new factory. In 1920 the owner let the factory on a lease for twenty-one years at an annual rent of 700*l.*, which exceeded the aggregate rents at which the houses were let on August 3, 1914. The lessee contended that the amount of the excess was irrecoverable from him by the owner and claimed under s. 14 of the Rent (Restrictions) Act, 1920, to recover so much thereof as he had paid to the owner:—

Held, that the standard rent of the factory was the rent at which it was let in 1920, when it was first let, and that, as this rent excluded the operation of the Rent (Restrictions) Acts, the lessee's claim failed.

Judgment of the Divisional Court [1921] 2 K. B. 799 affirmed.

APPEAL from the decision of the Divisional Court (1) on appeal from the Clerkenwell County Court.

(1) [1921] 2 K. B. 799.

The defendant, Mrs. Barnett, was on August 3, 1914, the owner of three adjoining houses, Nos. 26, 28 and 30 Shepperton Road, in the parish of St. Mary, Islington. The houses were then dwelling houses with shops on the ground floor. They were respectively let at rents of 42*l.*, 52*l.* and 52*l.* per annum and were of the respective rateable values of 35*l.*, 34*l.* and 34*l.* The blank wall of one of the houses was separately let at a rent of 10*l.* and rated at 8*l.* In 1918 the houses had become vacant, and the defendant threw the three houses together and converted them into one business building or factory. For that purpose she made openings in the two party walls on all floors; removed the three staircases and substituted one new staircase in a new position; removed the old floors and made new ones and laid the new ground floor at a level different from that of the old; removed the sculleries and lavatories which were at the rear of the three houses, and built a new addition containing a basement and ground floor rooms on new foundations at the rear of two of the houses so as to enlarge the ground floor and basement accommodation. Where the party walls had been cut away new piers were erected on new foundations to strengthen the walls. And several new lavatories were constructed, making ten in all. By these alterations the cubic capacity of the building was increased by more than one-third of the cubic capacity of the three houses as they were before. Beyond these alterations and addition the structure of the three houses was not altered, and particularly the old foundations, the front and end wall, the back wall (except where the new addition joined the old building), and the roof, doorways and windows remained as before. These alterations were made at a cost of 2062*l.* On their completion in 1920 the defendant by an indenture of lease dated July 8, 1920, let the premises to the plaintiffs, who carried on the business of ostrich-feather manufacturers, for a term of twenty-one years from June 24, 1920, at the annual rent of 700*l.* The parcels were described in the lease as "All those pieces of ground situate in and on the north-east side of Shepperton Road together with the messuages or

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tenements, shops and buildings erected thereon known as Nos. 26, 28 and 30 Shepperton Road aforesaid." The plaintiffs on the execution of the lease paid half a year's rent, 350*l.*, in advance, and shortly afterwards brought this action in the county court under s. 14, sub-s. 1, of the Rent (Restrictions) Act, 1920, to recover back so much of it as represented an unpermitted increase of the "standard rent." The defendant contended that as the premises in their altered form were first let in July, 1920, the statute did not apply.

The county court judge held that the individual houses having been before the conversion protected against an increase of rent by the Rent (Restrictions) Act, 1915, as the rateable value of no one of them exceeded the limit mentioned in that Act, retained that protection even after the conversion, and that the Acts of 1915 and 1920 applied to the factory. He therefore gave judgment for the plaintiffs for 272*l.*

The defendant appealed to the Divisional Court and that Court (Bray and Lush JJ.) (1) held that the factory was a different thing from the three houses of which it was composed; that it was first let in July, 1920, and that as there was no standard rent before that date the rent then reserved did not exceed the standard rent. The appeal was therefore allowed.

The plaintiffs appealed.

J. B. Matthews K.C. and *F. J. Newman* (*Foà* with them) for the appellants.

Hon. S. O. Henn Collins for the respondent was not called on.

BANKES L.J. This appeal must be dismissed. At the date of the Rent (Restrictions) Act, 1915, there were in existence three separate dwelling houses numbered 26, 28 and 30 Shepperton Road, in the parish of St. Mary, Islington; they were all let, and the rateable value of each house was such as to bring it within the operation of the Act of 1915. And so they remained until in 1918 the respondent, the owner,

(1) [1921] 2 K. B. 799.

obtained vacant possession of these houses and was minded to convert them into a factory. There is no suggestion of any merely colourable alteration made with a view to evading the statute. It was a bona fide alteration by the owner at very considerable expense of what had been three dwelling houses into a factory. [The Lord Justice stated in detail the alterations made in the premises, and proceeded :] The appellants were prepared to take a lease of this factory for twenty-one years at a rent of 700*l.* a year. When they had done this and paid half a year's rent, it occurred to them that though they had agreed to pay rent at the rate of 700*l.* a year the Rent (Restrictions) Act, 1920, relieved them from liability to pay more than the standard rent of the three dwelling houses and enabled them to recover any surplus paid by them above that amount. Accordingly they brought an action in the county court to recover the amount which they said they had overpaid in respect of half a year's rent. The county court judge gave judgment for them. This judgment was reversed by the Divisional Court, and this appeal is from that decision.

In my opinion the rights of the parties depend on the true inference to be drawn from the facts. The county court judge has not drawn the inference which alone could support his judgment and in my opinion there was no evidence from which he could have drawn that inference. The question is whether the premises included in this lease are the same as those which were let as dwelling houses when the Act of 1915 was passed. The answer is, they are not. The Act of 1915 applied to each one of the dwelling houses ; so long as they remained identifiable they continued subject to the provisions of that statute, but when they lost their identity the statute no longer applied any more than it would apply if instead of being structurally altered the three houses had been pulled down and a new building had been erected on their site. It could not then be contended that the Act applied to the new building because it had applied to the three old ones. So here ; the identity of the three houses can no longer be maintained ; the building which has replaced

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them is a new building and it was never let at a rent which would bring it within the Rent (Restrictions) Acts. The appeal must therefore be dismissed.

SCRUTTON L.J. I agree. In 1914 there were three dwelling houses each of which on account of its rateable value came within the Rent (Restrictions) Act, 1915, when that Act was passed. The landlady got vacant possession of these three houses and made a complete change in them. She converted the three dwelling houses into one factory. If a tenant took No. 26 he would find no means of going through it from the ground floor to the first floor; the kitchen and lavatory and hot water appliances were removed, and it is idle to say that No. 26 has not ceased to exist as a dwelling house.

Mr. Matthews argued that when a dwelling house comes within the Rent (Restrictions) Acts, the restrictions cling to the structure even when it has ceased to be a dwelling house. He goes further. He contends that even if the dwelling house were demolished the restrictions would inhere in the land. That is a mistaken view. The restrictions remain so long as there is a dwelling house. If the dwelling house becomes a factory what happens? Before the Act of 1920 there were no restrictions on the letting of a factory, but by s. 13, sub-s. 1, that Act is to apply to any premises used for business trade or professional purposes as it applies to a dwelling house, and as though references to a dwelling house included references to any such premises. The standard rent of these business premises is the rent at which they were let on August 3, 1914, if they were let at that date. They were not let at all until after that date. In that case the standard rent is the rent at which they were first let; and that is 700*l.*, which excludes the operation of the Act. The rents of former dwelling houses are not to be taken as the standard rent of what is now a factory. Mr. Matthews relied upon s. 12, sub-s. 6, "where this Act has become applicable to any dwelling house . . . . it shall continue to apply thereto whether or not the dwelling house

continues to be one to which this Act applies"; but that sub-section applies only to that which is still a dwelling house, although the Act may have ceased to apply to it. There are dwelling houses to which in a sense the Act does not apply; for instance the dwelling houses described in sub-s. 7. Sub-s. 6 does not mean that when a dwelling house to which the Act applies has once existed, all buildings subsequently erected on its site, whether houses or not, are subject to the restrictions of the Act.

ATKIN L.J. I agree. The claim of the appellants is based on s. 1 of the Act of 1920: "Where the rent of any dwelling house to which this Act applies . . . . has been, since March 25, 1920, or is hereafter, increased, then, if the increased rent . . . . exceeds by more than the amount permitted under this Act the standard rent . . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant" . . . . By s. 14, sub-s. 1, if any sum irrecoverable by the landlord has been paid by the tenant it may be recovered by the tenant. The answer of the respondent is that the building in question is not a dwelling house to which the Act applies. Sect. 12, sub-s. 2, which specifies the dwelling houses to which the Act applies, does not help the appellants until the standard rent of the building is ascertained. In order to ascertain the standard rent the first question is, Was this building let on August 3, 1914? The answer is, it was not. The building which has been let to the appellants is a factory covering Nos. 26, 28 and 30. The houses let on August 3, 1914, were different houses. Then inasmuch as this house did not exist in 1914 and was let for the first time under the lease of July 8, 1920, at a rent of 700*l.* it is a house to which the Act does not apply. That is the contention of the respondent and in my opinion it is right. It is said that this question whether the original houses have lost their identity is a question of fact which must have been answered by the county court judge in favour of the appellants. In my opinion the question involves matter of law. As matter of law the only inference that can

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properly be drawn from the facts is that this building first came into existence when it was let to the appellants and is not identical with the houses numbered 26, 28 and 30 as they existed in 1914. For the decision of this case it is not necessary to decide whether the building was erected after or was in course of erection on April 2, 1919, so as to be excluded by s. 12, sub-s. 9, from the operation of the Act. I should think there could not be much doubt about the matter, but it was not considered by the county court judge.

Appeal dismissed.

Solicitor for appellants: *A. D. Vandamm.*
Solicitor for respondent: *H. A. Phillips.*

W. H. G.

1921
Oct. 27.

NEWMAN *v.* KLAUSNER.

Mayor's and City of London Court—Procedure—"Original Mayor's Court action"—Appeal—Time within which to be entered—Mayor's Court of London Procedure Act (20 *&* 21 *Vict. c. clvii.*), *ss.* 8, 10—*Mayor's and City of London Court Act*, 1920 (10 *&* 11 *Geo.* 5, *c. cxxxiv.*), *ss.* 8, 11—*The Mayor's and City of London Court Rules*, 1921 (*St. R. & O.*, 1920, *No.* 2382/*L.* 61), *Order* III., *rr.* 1, 2; *Order* VI., *r.* 1.

An appeal from the Mayor's and City of London Court in an "original Mayor's Court action" must still be brought within two days as required by s. 8 of the Mayor's Court of London Procedure Act, 1857, which is not affected in this respect by the Mayor's and City of London Court Act, 1920, and the rules made thereunder. The High Court has no jurisdiction to extend the time.

APPEAL from the Mayor's and City of London Court.

The plaintiff claimed 110*l.* damages for breach of contract in the Mayor's and City of London Court, in an action commenced after the Mayor's and City of London Court Act, 1920, came into force. The action was tried in the "Original Mayor's Court actions" list before the Recorder on June 22, 1921. He entered judgment for the defendant, and counsel for the plaintiff asked for leave to appeal. The Recorder

informed him that leave was unnecessary, and no leave was in fact given; and on July 13, 1921, the plaintiff gave notice of appeal.

Leon Freedman for the defendant took the preliminary objection that the appeal was out of time not having been brought within two days as required by the Mayor's Court of London Procedure Act, 1857, s. 8. (1) The High Court

(1) The Mayor's Court of London Procedure Act, 1857, s. 8: "If either party appearing on the trial of any cause in which the sum sought to be recovered shall exceed the sum of twenty pounds shall be dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any one of the superior courts . . . ; provided that such party shall, within two days after such determination or direction, give notice of appeal to the other party or his attorney, and also give security within such time or times as the court shall direct . . . . for the costs of the appeal. . . . ."

Sect. 10: "If upon the trial of any issue the judge shall grant leave to the plaintiff or defendant to move in any of the superior courts to set aside a verdict or a non-suit, ... or for a new trial, the party to whom such leave may have been given may apply by motion to such superior court, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in such superior court."

The Mayor's and City of London Court Act, 1920, s. 8: "All causes and proceedings in the court shall be commenced by plaint, but in the case of any cause or proceeding which could not previously to the commencement of this Act have been brought in the City of London Court but which could have been brought in the Mayor's Court . . . . provision shall be made by rules . . . . for adopting in regard to any such cause or proceeding subject to any modifications contained in the rules the procedure of the Supreme Court in lieu of the procedure which at the date of the commencement of this Act was in use in the Mayor's Court."

Sect. 11: "Nothing in this Act contained shall repeal or vary the provisions of the several Acts affecting the Mayor's Court or the City of London Court except so far as any provisions of those Acts are varied by or inconsistent with this Act."

The Mayor's and City of London Court Rules, 1921, Order III., r. 1: ". . . . the procedure of the Supreme Court shall be adopted so far as the same is contained in or modified by the rules set out in Schedule I. to these rules. . . . ." (The rules set out in the Schedule deal with procedure in the action down to judgment, but are entirely silent as to appeals.)

Rule 2: "The rules referred to in Rule 1 of this Order shall be read in addition to and not in substitution of the rules of court and practice applied to Mayor's Court [*sic*] previously to the Mayor's and City of London Court Act, 1920, and save and except where such Mayor's Court Rules and practice are varied or inconsistent with these rules such rules and the practice and procedure heretofore in use in the Mayor's

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has no jurisdiction to extend the time: *Kirby* v. *North British and Mercantile Insurance Co.* (1) An appeal is not a matter of "procedure" at all; even if it was, there is nothing in the Act of 1920 and the rules made under that Act, which affects the question, and therefore the Act of 1857 must still be treated as being in force.

Phineas Quass for the plaintiff. I admit that I must satisfy the Court that this is a matter of procedure, and I rely on *Poyser* v. *Minors*. (2) The effect of s. 8 of the Mayor's and City of London Court Act, s. 8, and the rules made under it—though the rules are clearly defective—is to make the High Court procedure applicable, and to give a right of appeal within twenty-one days. Though it may be against me, I feel bound to call the attention of the Court to s. 11 of the Act of 1920.

[SHEARMAN J. There is a specific statutory right of appeal in the Act of 1857. On the principle that "Generalia specialibus non derogant," can we hold that that is affected by anything in the later Act and rules ?]

If not, this unfortunate position results: a man who claims less than 100*l.* has twenty-one days in which to appeal; the plaintiff in a more important case, involving more than 100*l.*, must appeal in two days and give security for costs.

HORRIDGE J. It is quite clear that if this case had been heard before the passing of the Mayor's and City of London Court Act, 1920, no appeal could have been brought after two days, and that this Court would have had no power to extend the time: *Kirby* v. *North British and Mercantile Insurance Co.* (1) But it is contended that the rules made under the Act of 1920 have had the effect of extending the

Court shall continue to be used and in force."

Order VI., r. 1: "The expression 'an original Mayor's Court action' means any cause or proceeding which could not previously to the commencement of the Mayor's and City of London Court Act, 1920, have been brought in the City of London Court, but which could have been brought in the Mayor's Court."

(1) [1896] 2 Q. B. 99.

(2) (1881) 7 Q. B. D. 329, 333.

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right of appeal, so that the same time now applies as in county court appeals. I find the Act and rules very difficult —I will not say to construe—but to understand. [His Lordship read them, and continued:] It is provided that the rules of the Supreme Court shall be applied by rules which may themselves contain modifications of the Supreme Court rules. The section, and the rules which have been made under it, seem to me to deal only with the manner in which the action is to be carried on, and to give no right of appeal. The rules in the Schedule apply only to matters down to judgment, and what they have done is to say in effect "The rules as to appeals are not applied." That being so, the Court is driven back on s. 11 of the Act of 1920. Unfortunately we are bound to hold that the preliminary objection must be upheld and the appeal dismissed. I desire to add that my judgment has proceeded on the assumption that this is a matter of procedure, but I must not be taken as deciding that it is anything of the sort.

SHEARMAN J. I am of the same opinion. It is a great pity that the stringent restrictions on the right of appeal from the Mayor's Court were not swept away by the new Act. But they have not been swept away, and the result is that an appeal without leave must be brought within two days. The plaintiff in this case applied for leave to appeal and was told that leave was unnecessary: on the assumption that that was correct, he brought his appeal within twenty-one days.

I think it was not correct. Though the right of appeal is given in the Mayor's Court of London Procedure Act, 1857, I do not think it is a matter of procedure at all, but a substantive statutory right of appeal. But assuming that it is procedure, it is regulated by the Act of 1920, which does not say that in "original Mayor's Court actions" "the Supreme Court rules shall apply except as modified," but that rules shall be made for the purpose of applying the Supreme Court procedure. No such rules have been made with regard to the right of appeal, and therefore the Act of

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1857 still applies, and, with regret, we must uphold the preliminary objection and dismiss this appeal.

Preliminary objection upheld; appeal dismissed.

Solicitors for defendant: *Ransom & Williams.*
Solicitors for plaintiff: *Elsmore & Silkin.*

J. W. H.

1921
Oct. 21;
Nov. 3.

THE KING *v.* LYON.

Ex parte GATTI.

Education—Expenditure—"Elementary" Education—"Visits to places of educational value or interest"—Performances of Shakespearean Plays—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 7, *sub-s.* 4; *s.* 97—*Minutes of the Board of Education* (*the Education Code*), *Arts.* 43 & 44 (*b*).

The power of a local education authority to authorize visits to "places of educational value and interest" in school hours under Art. 44 (*b*) of the Education Code does not extend to defraying out of public funds the cost of providing such places. Nor does attendance at a theatrical performance fall within the words "visits to places of educational value and interest." Expenditure on special performances of Shakespearean plays for school children was therefore rightly disallowed.

RULE NISI for certiorari.

The facts, arguments and relevant statutory enactments are sufficiently set out in the judgment of the Court.

Montgomery K.C. and *Sir John Lithiby* showed cause.

Macmorran K.C. and *Craig Henderson* in support of the rule.

Cur. adv. vult.

Nov. 3. The written judgment of the Court (Lord Trevethin C.J., Sankey and Acton JJ.) was read by

LORD TREVETHIN C.J. These proceedings are brought under a rule nisi to decide the right of the London County Council, as the Local Education Authority, to spend the

ratepayers' money upon sending children attending the public elementary schools in their area to witness performances of Shakespearean plays at various theatres and halls in London. During the year ending March 31, 1920, the council paid a sum of 2745*l.* for the purpose of defraying, from time to time, expenditure in organizing, in various parts of London, special Shakespearean performances by a professional theatrical company. The organization was carried out by the London Central Shakespeare Committee of Teachers, and the money voted by the council was laid out partly in hiring various halls in which the performances could take place, and partly in paying for a theatrical company to give performances at such halls. The district auditor for the county of London disallowed the expenditure upon the ground, amongst others, that there is no statutory authority, express or implied, empowering a local education authority to defray, out of the funds under their control, the cost of hiring a theatre and/or providing actors, with a manager, for the purpose of representing stage plays to children from public elementary schools. He surcharged the amount upon the chairman of the Finance Committee of the council, and the chairman asks the Court to quash the auditor's certificate upon the ground that the expense is a proper and legal one, and lawfully incurred.

Mr. Macmorran, on behalf of the chairman, supports this contention as follows: First, by s. 7 of the Elementary Education Act, 1870, every elementary school which is conducted in accordance with the regulations therein set out shall be a public elementary school; and every public elementary school shall be conducted in accordance with the said regulations, of which No. 4 is as follows: "The School shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual Parliamentary grant." (2.) By s. 97 of the said Act "The conditions required to be fulfilled by an Elementary School in order to obtain an annual parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being." The minutes

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referred to in s. 97 are known as "the code." (3.) The practice of taking the children in question to see these plays is allowed by the code, and an attendance at the theatre is one of the attendances which count to obtain the grant from the Board of Education. He argues, therefore, that an expenditure upon an attendance which is authorized by the code cannot be illegal and ought not to be disallowed.

Now there is nowhere to be found, either in the statutes or in the code, any definition of "elementary" education, although it may be permissible to doubt whether attendance at a Shakespearean play was ever contemplated by the framers of the 1870 Act as being an item of elementary education. Mr. Macmorran was, however, right in saying that educational ideas have developed during the last fifty years, and if he can show that these visits to a theatre come within the code he may, subject to a point hereinafter reserved, be entitled to succeed. The articles of the code upon which he relies are 43 and 44 (*b*.) (43.) "Attendance for the purpose of ascertaining the average attendance of a school may be reckoned only in accordance with the regulations of this and following article." (44.) "In making up the minimum time required under Article 43 in order that any attendance may be reckoned there may be included . . . . (*b*) any time occupied by visits paid during the school hours to places of educational value or interest, or by field work, or by rambles. Notice of the time and place must be sent to the inspector, but his previous sanction will not be required where the Local Education Authority have, in consultation with him, made satisfactory arrangements for sanctioning and regulating work done under this provision." Mr. Macmorran admits that unless he can bring himself within those sections his argument fails.

Now were these attendances at the performance of Shakespearean plays in various halls and theatres visits paid during the school hours to places of educational value or interest? It would be quite easy to give illustrations of places of educational value and interest in London; for example, the House

of Commons, Westminster Abbey, the Guildhall, the Tower of London and so forth, but is it possible to say that the attendance of children at the performance of a play at a theatre comes within the fair interpretation of the words "visits to places of educational value or interest"? Although the council are fully entitled to take children to such a place we do not think the words in s. 44 (*b*) entitle them not only to take the children to the place but to provide the place and provide the actors and actresses who give the performances. This is what in fact the council are doing, for, as above stated, they hire the theatre or hall in question and pay the actors to perform the play. The theatres and halls are situated in various parts of London. No doubt these theatres and halls are admirably suited for the purpose, but we cannot say that the theatres and halls themselves, apart from the performances, are places of educational value or interest. After all "The play's the thing." Nor does the matter stop there. If it is open to provide a theatre by hiring it, there seems no reason why the council should not provide one either by purchasing or erecting it. We therefore hold that the words in s. 44 (*b*) do not justify the council in the course they have taken and are of opinion that the auditor was right in holding the expenditure to be illegal and surcharging it.

We expressly reserve one point. Mr. Montgomery for the auditor contended that if these visits did come within s. 44 (*b*) of the code, that section was ultra vires. We express no opinion on this contention, but we desire to point out that the education code has to be laid before Parliament. If the Board of Education are desirous, and think it right, that elementary school children should attend such plays as part of their curriculum, it is quite easy to insert in the code words apt to cover such a course, and the subject can be brought to the notice of public bodies concerned who can then make representations on the matter, but it is not for this Court to strain language to uphold contentions of the character advanced in the present case, as we should be doing should we decide that the very inapt, and as we think wholly

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inapplicable, words of s. 44 (*b*) authorize the expenditure in question. In the result the rule will be discharged with costs and the auditor's certificate upheld.

Rule discharged.

Solicitors for the District Auditor: *Sharpe, Pritchard & Co.*
Solicitor for the rule: *D. P. Andrews.*

J. W. H.

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Nov. 3, 4.

[IN THE COURT OF APPEAL.]

FRENCH AND ANOTHER *v.* GETHING.

GETHING, CLAIMANT.

[1920. F. 1223.]

Bill of Sale—Registration—Husband and Wife—Gift by Husband to Wife—Household Furniture—Possession—Apparent Possession—Order and Disposition—Reputed Ownership—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 8—*Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 10.

By s. 4 of the Bills of Sale Act, 1878, "personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house . . . . or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

By s. 8: "Every bill of sale . . . . shall be registered under this Act, within seven days after the making or giving thereof, ... otherwise such bill of sale . . . . as against all sheriffs officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorizing the seizure of the chattels of the person by whom . . . . such bill of sale has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time . . . . of executing such process, ... and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale. . . . ."

By s. 10 of the Married Women's Property Act, 1882, "Nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, which, after such

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gift, shall continue to be in the order and disposition or reputed ownership of the husband."

By a post-nuptial deed in May, 1914, a husband gave his wife certain household furniture in the house in which the husband and wife lived together. The furniture remained in the house, which continued to be occupied by the husband and wife. The deed was not registered under the Bills of Sale Act, 1878. Execution creditors under a judgment recovered in 1920 against the husband levied execution at the house. The wife claimed the furniture. In an interpleader issue between the wife and the execution creditors :—

Held, that the furniture was not in the possession or apparent possession of the husband within the meaning of s. 8 of the Bills of Sale Act, 1878; nor in his order and disposition or reputed ownership within the meaning of s. 10 of the Married Women's Property Act, 1882.

Ramsay v. *Margrett* [1894] 2 Q. B. 18 followed.

Quaere whether the foregoing provision of s. 10 of the Married Women's Property Act, 1882, applies only when a husband and wife are living together in premises where the husband carries on business.

Judgment of the Divisional Court [1921] 3 K. B. 280 affirmed.

APPEAL from the judgment of a Divisional Court. (1)

The plaintiffs were the executors of one Hart who in 1920 had got a judgment against the defendant, Samuel Gething, for 622*l.* and costs.

Samuel Gething had on May 4, 1914, executed a deed whereby, after reciting that no settlement had been made upon the marriage of himself and his wife, the claimant, he in consideration of the natural love and affection which he had for the claimant, gave and made over to her the furniture and other effects in and about his dwelling house for her absolute use and benefit and as her separate estate and property.

The judgment obtained by Hart was not satisfied, and the plaintiffs proceeded to levy execution at the house where the defendant, who was the rated occupier of the house, lived with the claimant. The claimant claimed the furniture by virtue of the deed of May 4, 1914. An interpleader issue was directed and tried between the claimant and the plaintiffs. The deed had never been registered. The Master who tried the issue decided that the deed was a genuine deed and that possession of the furniture and effects in the house, with certain immaterial exceptions, had passed under

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it to the claimant according to the principle of *Ramsay* v. *Margrett*. (1) He therefore decided the issue in favour of the claimant.

The Divisional Court (Lush and Sankey JJ.) affirmed this decision.

The plaintiffs appealed.

Schiller K.C. and *Lightwood* (*A. Ralph Thomas* with them) for the appellants. These goods were in the apparent possession of the judgment debtor, Samuel Gething, within the meaning of s. 8 of the Bills of Sale Act, 1878. (2) The Court of Appeal in *Ramsay* v. *Margrett* (1) seem to have considered that if goods were in the possession of the wife they could not be in the apparent possession of the husband. The Court overlooked the definition of apparent possession in s. 4 of the Act, 1878. (2) Goods are in the apparent possession of the grantor of a bill of sale "so long as they remain or are in or upon any house or other premises occupied by him." Samuel Gething was the occupier of the house and the goods remained in the house until seized by the appellants. They had been in his possession; they were in his apparent possession at the date of the execution, and therefore by s. 8 of the Bills of Sale Act, 1878, the deed of May 4, 1914, not having been registered is void as against the appellants: *Ex parte Jay* (3), decided under the corresponding section in the Bills of Sale Act, 1854. In *In re Satterthwaite* (4) the wife was the occupier of the house and therefore the section did not apply. Vaughan Williams J. decided the case on that ground. If the husband had been the occupier, as he was in this case, the decision in *In re Satterthwaite* (4) would have been the other way. In *In re Emery* (5) Cave J. and the Court of Appeal held that furniture given by a husband to his wife by a post-nuptial settlement remained in the possession or apparent possession of the husband.

(1) [1894] 2 Q. B. 18.
(2) See headnote.
(3) (1874) L. R. 9 Ch. 697.
(4) (1895) 2 Mans. 52.
(5) (1888) 21 Q. B. D. 405.

Secondly, these goods were in the reputed ownership of the husband within the meaning of s. 10 of the Married Women's Property Act, 1882. (1) Lush J. in the Divisional Court treated the words "in the apparent possession or reputed ownership of the husband" as being borrowed from s. 15 of the Bankruptcy Act, 1869 (corresponding to s. 38 of the Act of 1914), with all that those words connote, including the condition that the husband must be carrying on a trade or business. This is not the right interpretation of the words. The words in s. 15 of the Act of 1869 were: "All goods and chattels being . . . . in the possession, order, or disposition of the bankrupt, being a trader. . . . ." In s. 38 of the Act of 1914 the words are: "All goods being . . . . in the possession, order or disposition of the bankrupt, in his trade or business. . . . ." In s. 10 of the Married Women's Property Act there is no mention of trade or business. The section deals with gifts by a husband to his wife and provides that if the property after the gift remains in the reputed ownership of the husband the gift is to be invalid as against the husband's creditors. Taken in its ordinary meaning the section would apply whether the husband was carrying on a business or not; and there is nothing to restrict the meaning. Furthermore the goods affected by s. 15 of the Bankruptcy Act, 1869, or s. 38 of the Act of 1914, are goods being in the order and disposition of the bankrupt "of which goods and chattels the bankrupt is the reputed owner" or "in such circumstances that he is the reputed owner thereof." In s. 10 of the Married Women's Property Act, 1882, order and disposition are not steps on the way to reputed ownership. Reputed ownership is independent of and alternative to order and disposition. It must therefore have a different meaning in the Married Women's Property Act from that which it has in the Bankruptcy Acts. Prima facie the furniture in a man's house is in his possession: *Ex parte Brooks* (2); *Chappell & Co.* v. *Harrison.* (3) To rebut this presumption some open notorious act must be done

(1) See headnote. (2) (1883) 23 Ch. D. 261.
(3) (1910) 103 L. T. 594.

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which may apprise persons concerned that the ownership has changed and is not or is no longer in the possession of the householder: *Lingard* v. *Messiter*. (1) A person may be in reputed ownership of goods without being able to sell or pledge them: *Sharman* v. *Mason*. (2)

[*Ex parte Watkins* (3); *Ex parte Wingfield* (4) and *Hollinshead* v. *Egan* (5) were also cited.]

Disturnal K.C. and *Wynn Werninck* for the respondent were not called on.

BANKES L.J. This is an appeal from a Divisional Court. The respondent was the wife of a judgment debtor. She lived with her husband in what Davey L.J. in *Ramsay* v. *Margrett* (6) called the conjugal domicil. The judgment creditor put in execution on the household goods in the house. The wife claims the goods. In her affidavit she stated that a considerable part of the goods had always been her property and had never been her husband's but had been given to her by her father; the rest had been given to her by her husband by a deed of gift. There is no suggestion that the deed is invalid or that it was not completed by the handing over of the last-mentioned goods. It was for all purposes a valid deed which passed the property in the goods. But it is said that the deed was a bill of sale and was not registered and therefore the judgment creditor had a right to say that notwithstanding the deed he was entitled to seize the goods in execution, first by virtue of s. 8 of the Bills of Sale Act, 1878, and secondly by virtue of s. 10 of the Married Women's Property Act, 1882. The Divisional Court refused to accept either contention and held rightly that the case was covered by *Ramsay* v. *Margrett*. (7) That was a claim by an execution creditor of a husband who was living with his wife, as the husband was in this case. There the wife had bought the goods from her husband, and that is the only

(1) (1823) 1 B. & C. 308.
(2) [1899] 2 Q. B. 679.
(3) (1873) L. R. 8 Ch. 520.
(4) (1879) 10 Ch. D. 591.
(5) [1913] A. C. 564.
(6) [1894] 2 Q. B. 18, 27.
(7) [1894] 2 Q. B. 18.

difference between the cases. Mr. Lightwood contended that the difference between a purchase by a wife and a voluntary gift to a wife was a very material difference. In my opinion there is no material difference. In either case the goods become the absolute property of the wife, and absolute property in the wife is the basis of the decision in *Ramsay* v. *Margrett*. (1) It is immaterial to consider how the goods became her property. That case decided two things; first, that where the husband and wife are living together in the conjugal domicil there is no presumption that the household goods are in the apparent possession of the husband; secondly, that the doctrine laid down in Littleton's Tenures (2) and *Jones* v. *Chapman* (3), that possession follows title, applies to chattels as well as to land. Lopes L.J. expressed a doubt how far it would operate to take goods out of the apparent possession of the husband; but Lord Esher M.R. said (4): "So in this case the money which the plaintiff had was her money, and the furniture was her husband's, and she had the right to buy with her money whatever she chose. When she bought these goods from her husband and paid him the price, they became her separate property. The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. What is the rule of law as to possession in such a case? When the possession is doubtful it is attached by law to the title. Therefore, under such circumstances, the law considers the goods to be in the possession of the wife, who has the legal title to them." The Master of the Rolls must have held that this was enough to take them out of the apparent possession of the husband, because he continues: "This consideration again is sufficient to oust the claim of the execution creditor." So this doctrine, which was first invoked to decide between adverse claimants to land, was applied by Lord Esher M.R. to a claim by an execution creditor of a husband to goods of the wife where it was doubtful

(1) [1894] 2 Q. B. 18.
(2) Sect. 701.
(3) (1847) 2 Ex. 803, 821.
(4) [1894] 2 Q. B. 25.

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whether the husband or the wife was in apparent possession of them. Davey L.J. put it even more clearly. After citing *Jones* v. *Chapman* (1) and *Charlesworth* v. *Mills* (2) he said (3): "Here the goods were in the conjugal domicil, and were being used by the husband and the wife for the purposes of that domicil. Under the circumstances I draw the inference, and I think it is an irresistible inference, that the intention was that the goods should become the separate property of the wife out and out, in the same way as the other property which belonged to her, and was in her possession."—That intention may be effected by a gift as well as by a sale—"In other words, the intention was that both the property in the goods and the possession of them should pass at once to the wife. . . . . The fact that the goods remained in the house as before was equally consistent with their being in her possession as with their being in his possession."—Therefore they were not in the apparent possession of the husband—"If there had been a formal delivery of the goods to the wife, there could have been no question, but I do not think that such a delivery was necessary. I should, therefore, be prepared to hold that the plaintiff had a sufficient possession of the goods to take the case out of the Bills of Sale Act." That means that the husband was not in apparent possession of the goods. In my opinion therefore *Ramsay* v. *Margrett* (4) is on all fours with this case; it binds us, and the judgment of the Divisional Court was right upon the point arising on s. 8 of the Bills of Sale Act, 1878.

But Mr. Lightwood has argued that a somewhat different question arises under s. 10 of the Married Women's Property Act, 1882, and that the case must be separately considered under that section. I am content to assume that. That section after dealing with investments by a wife of her husband's money without his consent, continues: "And nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his

(1) 2 Ex. 803.
(2) [1892] A. C. 231.
(3) [1894] 2 Q. B. 28.
(4) [1894] 2 Q. B. 18.

wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband. . . . ." Mr. Lightwood relied on the word "continue" as showing that the section refers to property which had been the husband's and which has passed to the wife. In order that the section may operate the property must continue to be in the order and disposition or reputed ownership of the husband, which, I think, means in his actual order and disposition or in his reputed ownership. There is no question of the husband's order and disposition in the present case, because the property is the wife's and is in her order and disposition. Was it in the reputed ownership of the husband? We have been referred to many cases, all differing in their facts from this, disputes between an execution creditor and a person who was indisputably in possession of the goods, where the question was whether upon a true inference from the facts he was the reputed owner also. I accept all that was said by Lord Selborne L.C. in *Ex parte Watkins*. (1) His judgment tends to the opposite conclusion to that which Mr. Lightwood asks us to draw. Lord Selborne said: "There is no inflexible rule of law that because a man who was once the owner of goods and has sold them remains in possession of them he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignees; but it is always a question of fact whether or no the circumstances are such as to create that reputation. What, then, are the principles applicable to the determination of that question? Much of the argument seems to me to have proceeded on a fallacious application of the expressions 'knowledge of the world' and 'known to the public.' The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position

(1) L. R. 8 Ch. 520, 528.

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of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject." Are the goods in the present case in such a position as to convey to the minds of those who know their situation the reputation of ownership in the husband? They are household goods in the conjugal domicil of the husband and wife. According to *Ramsay* v. *Margrett* (1) this is not enough to warrant the inference that they are in the apparent possession of the husband. How can the proper inference be that, although not in his apparent possession, they are in his reputed ownership? In my opinion the distinction which Mr. Lightwood drew between apparent possession and reputed ownership does not avail him in this case.

I should however like to draw attention to the point raised by Lush J., that so much of s. 10 of the Married Women's Property Act, 1882, as speaks of order and disposition or reputed ownership is dealing only with cases in which a man and his wife are living together on premises where the husband is carrying on business. We have not heard argument on behalf of the respondent, and it is not necessary to decide the point. In my opinion it requires further consideration. The appeal must be dismissed.

SCRUTTON L.J. In May, 1914, Samuel Gething, the execution debtor, made an absolute gift by deed to his wife, the respondent, of certain furniture and other effects in the dwelling house where they lived together. This is not an attempt to set aside the gift under s. 42 of the Bankruptcy Act, 1914. If it were the grantor would have to discharge the burden of proof imposed on him by that section. This is an attempt by judgment creditors of the husband to take in execution goods belonging to the wife; and they claim

(1) [1894] 2 Q. B. 18.

to do this on two grounds. First, by virtue of s. 8 of the Bills of Sale Act, 1878. They say that the deed was an assurance of personal chattels and therefore a bill of sale within s. 4 of the Act; it was admittedly unregistered; therefore by s. 8 it is, as against all sheriffs' officers and other persons seizing the chattels comprised in it under process of the Court and against every person on whose behalf the process shall have issued, to be deemed fraudulent and void so far as regards the property in or right to possession of the chattels which at the time of executing the process and after seven days from the making or giving of the bill of sale "are in the possession or apparent possession of the person making such bill of sale." Two groups of cases have grown up about this section in which the question has been whether a document, which comes into existence at the same time as an act passing property in chattels, is or is not a bill of sale; for instance if there is an oral agreement to sell certain goods, and at the time of the sale a receipt for the purchase money, or an inventory of the goods, is given; the question whether the receipt or inventory is a bill of sale within s. 4 turns on which of these groups the particular case belongs to, and that depends upon whether the act which passes the property is independent of the written document or not. If the act is independent of the document the document is not a bill of sale. The question does not arise in this case, because beyond all doubt the deed of gift was the act which passed the property, and therefore it was a bill of sale.

But the appellants must go further and prove that the goods remained in the possession or apparent possession of the grantor, the husband. At the present day when wives can, and often do, possess as much property as their husbands it is impossible to say which of the two is in possession or apparent possession of the household furniture if nothing more is known than that the parties live together in the house. But if the furniture is in the apparent possession of both, s. 8 of the Act of 1878 does not apply. That is the first answer to the appellants on this point. And the second

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is that if it is doubtful which of two persons is in possession of property, possession is in that one who has the right and title to possession. That person was the respondent. Therefore the appellants' claim under the Act of 1878 fails.

Their second claim is under s. 10 of the Married Women's Property Act, 1882. That section provides that "Nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband." I should like to point out that properly speaking the fact that goods are in the order and disposition of a person is evidence that he is the reputed owner of them; but this section seems to imply that to be in the order and disposition of the husband is different from being in his reputed ownership. Be that as it may, however, in the present case there is no evidence that these goods remain in the order and disposition of the judgment debtor, nor any evidence that they remain in his reputed ownership; though I think in this case the one conclusion follows from the other, for if the goods, being household furniture, are not in his order and disposition, they are not in his reputed ownership. For these reasons I think the appeal must be dismissed.

ATKIN L.J. I agree. In my opinion this case is covered by *Ramsay* v. *Margrett* (1); but if the questions raised are not concluded by the judgments of Lord Esher M.R. and Davey L.J. in that case it is time for this Court to declare that the law was correctly laid down by those learned judges. That case like this depended on the provisions of the Bills of Sale Act, 1878, and one of the questions was, as it is in this case, there being a bill of sale by a husband to his wife of household goods in the dwelling house of both, were the goods after the period of seven days mentioned in the section, in the possession or apparent possession of the grantor? *Ramsay* v. *Margrett* (1) seems to me to have decided that, where husband and wife are living together in the same house

(1) [1894] 2 Q. B. 18.

and the husband gives a bill of sale to his wife, not only are the goods in the possession of the wife and no longer in the possession of the husband, they are also in the apparent possession of the wife and no longer in the apparent possession of the husband. That must have been decided in *Ramsay* v. *Margrett* (1) because, assuming the document in that case to have been a bill of sale, if the goods had remained in the apparent possession of the grantor the bill of sale to be valid must have been registered; but both Lord Esher M.R. and Davey L.J. held that it was enough if possession had been transferred to the wife, implying that apparent possession followed and that the goods were neither in the possession nor in the apparent possession of the grantor. I think that case implies that "possession" and "apparent possession" mean sole possession and apparent sole possession just as "possession" and "reputed ownership" were held to mean sole possession and sole reputed ownership when it was a question whether goods were in the order and disposition clause of the Bankruptcy Act, 1869, s. 15: *Ex parte Dorman*. (2) During the argument I put this case by way of illustration: If there are three men in a boat belonging to one of them, the boat is in the possession of the owner and not in the possession of the two visitors or either of them, and is in his apparent possession and not in that of them or either of them; and if the owner sells the boat to one of the visitors, intending to pass the property in it to him, then possession and apparent possession are in the purchaser and not in the former owner. That illustration sets at rest a number of difficulties. In *Charlesworth* v. *Mills* (3) Lord Herschell was dealing with a case where the possession of the goods had plainly passed to a pledgee. He had only to consider the Act of 1882, therefore he reserved the case where though possession had passed to pledgees apparent possession might remain in the pledgor. There the debtor's goods had been seized by the sheriff and the sheriff's officer was in possession; then an arrangement was made between the

(1) [1894] 2 Q. B. 18. (2) (1872) L. R. 8 Ch. 51.
(3) [1892] A. C. 231.

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debtor and a firm of auctioneers by which they agreed to pay the judgment debt and costs, the man in possession was thenceforth to hold possession for the auctioneers, and the auctioneers were to sell the goods and repay themselves the amount of the judgment debt and costs which they had paid to the sheriff; this arrangement was completed; the auctioneers paid the sheriff and the officer gave them a receipt, and the debtor gave the auctioneers a letter embodying the terms of the arrangement. It is clear from these facts that possession had passed to the auctioneers. That was enough to take the case out of the Act of 1882. In a later case, *In re Satterthwaite* (1), Vaughan Williams J. seems to have been in doubt whether there might not be apparent possession in a husband although possession was in the wife. I think it was unnecessary to embark on that question, because when the goods had passed from the husband's possession to that of the wife there was an end of his apparent possession. I should like to add a few words upon the definition of apparent possession in s. 4 of the Bills of Sale Act, 1878: "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house . . . . or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person." The contrast there is between the occupier of a house and some person outside to whom symbolic possession of the goods in the house has been given; not between one occupant of the house and another occupant of the house to whom actual possession of the goods has been given. This was clear even before *Ramsay* v. *Margrett* (2), as appears from *Shepherd* v. *Pulbrook*. (3) Very material upon the question of possession and apparent possession is the doubt there expressed by Lindley L.J., who "wished to guard against it being taken that goods which were the separate property of the wife were in the apparent possession of the husband,

(1) 2 Mans. 52.

(2) [1894] 2 Q. B. 18.

(3) (1888) 4 Times L. R. 642.

when husband and wife were living together." In my opinion the appellants fail on the point under s. 8 of the Bills of Sale Act, 1878.

Their second argument is upon s. 10 of the Married Women's Property Act, 1882. After dealing at considerable length with investments by a married woman of her husband's money without his consent, and after providing that the Court may order the investment and the dividends thereof to be transferred and paid to the husband, the section, without much relation to what has gone before, proceeds to enact: "and nothing in this Act contained shall give validity as against creditors of the husband, to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband. . . . ." I agree with Bankes L.J. in thinking it very doubtful whether this enactment was intended to apply only where the husband and wife are living in premises where the husband is carrying on business. I wish to reserve that question, though I have very little doubt that the words "order and disposition" and "reputed ownership" are taken from the Bankruptcy Act, 1869, and inasmuch as the words "being a trader," which appeared in s. 15, sub-s. 5, of that Act, are altogether omitted from s. 10 of the Married Women's Property Act, 1882, I should have thought there was much force in the argument that this omission of all reference to the husband's trade or business was deliberate. But however that may be, I find no ground for saying that these goods were in the order and disposition of the husband, which must mean that the husband has the right or the permission of the true owner to dispose of them or give directions for their removal from one place to another. There is no evidence in this case that the husband has either the one or the other. As to reputed ownership when applied to household furniture, if apparent possession is negatived it is difficult to imagine how a husband who has neither possession nor apparent possession of the furniture can be said to be the reputed owner of it. At any rate in the present case there is no evidence that these goods are in the reputed ownership of

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the husband. I cannot help thinking that the Divisional Court chose an unfortunate example of the application of this section when they suggested the business of a hotel keeper carried on by the husband, because the well recognized custom of hiring furniture for a hotel would be enough to take the furniture out of the reputed ownership of the husband. (1) But upon the main points of the case I agree with the judgments which have been delivered and with the judgment of Lush J. who speaks with special authority on this branch of the law.

Appeal dismissed.

Solicitors for appellants : *Reid, Sharman & Co.*
Solicitor for respondent : *A. Sugden.*

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THE KING *v.* MAYOR, &c., OF CAMBRIDGE.

Ex parte CAMBRIDGE PICTURE PLAYHOUSES, LIMITED.

Local Government—Refusal to pass Plans for Cinematograph Theatre—Contravention of Act of Parliament—Means of Egress—Narrow and crowded Streets—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 158—*Public Health Acts Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 36.

By s. 158 of the Public Health Act, 1875, "Where a . . . . plan of any work is required by any byelaw made by an urban authority to be laid before that authority, the urban authority shall . . . . signify in writing their approval or disapproval of the intended work to the person proposing to execute the same."

By s. 36, sub-s. (1), of the Public Health Acts Amendment Act, 1890, "Every building which . . . . in any urban district is used as a place of public resort shall, to the satisfaction of the urban authority, be . . . . supplied with ample, safe, and convenient means of ingress and egress for the use of the public, regard being had to the purposes for which such building is intended to be used, and to the number of persons likely to be assembled at any one time therein."

The owners of land in Cambridge, intending to build thereon a cinematograph theatre, submitted plans to the corporation under s. 158 of

(1) *Crawcour* v. *Salter* (1881) 18 Ch. D. 30 ; *Ex parte Turquand* (1885) 14 Q. B. D. 636 ; *In re Tabor* [1920] 1 K. B. 808.

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the Public Health Act, 1875, which plans complied in every respect with the byelaws of the borough as to building. The corporation refused to pass the plans, alleging that by reason of the narrowness of several of the adjoining streets, and the congested traffic, the building would not be provided with ample, safe and convenient means of egress for the public, and would be an infringement of s. 36 of the Act of 1890:—

Held, (1.) that the corporation were not entitled to refuse their approval of the plans on account of the narrowness of adjoining streets and the congestion of traffic therein;

(2.) That there must not only be a bona fide belief as to an infringement of s. 36 of the Act of 1890, but reasonable grounds must be shown for that belief.

RULE NISI for mandamus to the Corporation of Cambridge.

The Cambridge Picture Playhouses, Ld. (hereinafter called the applicants) were owners of a piece of land in the borough of Cambridge abutting on Sidney Street, Sussex Street, and Hobson Street. The land was purchased for the purpose of erecting thereon a cinematograph theatre. Before the plans were prepared for the purpose of being laid before the corporation of the borough suggestions were made as to the proposed building being set back from the original frontage lines of the site in Sidney Street and Sussex Street, with a view to the widening of those streets, and negotiations took place between the applicants and the corporation. Plans were prepared by the borough surveyor providing for the setting back of the building line in Sidney Street, and the widening of Sussex Street at the corner of Sidney Street. The applicants' architects were instructed to revise the plans accordingly, and as so revised the plans were deposited with the town clerk for approval by the council.

On March 30, 1920, the plans were also submitted to the justices of the borough, to whom had been delegated the administration of the Cinematograph Act, 1909, and were approved by them.

At a meeting of the council on April 1, 1920, it was resolved that it was desirable that Sussex Street should be widened from end to end; but subsequently the plans were again considered by the plans committee who recommended the council to disapprove the plans on the ground that on account of the congestion of traffic in Sidney Street and

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Sussex Street the building if constructed would not satisfy the provisions of s. 36 of the Public Health Acts Amendment Act, 1890.

At a special meeting of the council held on February 8, 1921, this recommendation was adopted by the council and notice thereof was given to the applicants.

This rule nisi was then obtained by the applicants calling on the corporation to consider and determine according to law, and particularly according to s. 158 of the Public Health Act, 1875, the matter of the application for the approval of the plans, on the ground that the corporation had no jurisdiction to reject the plans, and that they did not consider or determine the application made to them according to law.

The rule nisi now came on for argument.

Montgomery K.C. and *Carrol Romer* showed cause. It is not disputed that the plans deposited complied with the requirements of the byelaws; but the council were justified in refusing to approve the plans on the ground that, on account of the narrowness of adjoining streets, the building could not be provided with ample, safe, and convenient means of ingress and egress for the use of the public. The applicants contend that the council exceeded their jurisdiction under s. 158 of the Public Health Act, 1875, in taking into consideration anything but the building byelaws. But it is submitted that the council may take into consideration any question arising in regard to buildings and streets and other matters in respect of which they exercise statutory or other authority. Amongst other things they may take into consideration s. 36 of the Public Health Acts Amendment Act, 1890. If the council are right in taking this section into consideration, it cannot be disputed that it applies to the present case.

In *Smith* v. *Chorley Rural Council* (1) it was held that if the local authority honestly believed, having regard to the facts, that there would be an infringement of an Act of Parliament, a mandamus would not be issued.

(1) [1897] 1 Q. B. 678.

[*Reg.* v. *Eastbourne Corporation* (1) was also cited.]

In *Rex* v. *West Hartlepool Corporation, Ex parte Richardson* (2), and *Rex* v. *Tynemouth Corporation* (3) the local authorities were held entitled to refuse to sanction plans in respect of matters which were within their jurisdiction, although the plans themselves were in accordance with the byelaws.

In *Rex* v. *Bexhill Corporation, Ex parte Cornell* (4) the local authority was held not entitled to refuse approval to plans on grounds outside the merits of the plans themselves; but in that case there were no facts outside the plans which furnished a justification for disapproval.

Disturnal K.C. and *St. John Field* in support of the rule. Under the provisions of s. 1 of the Cinematograph Act, 1909 (9 Edw. 7, c. 30), the Secretary of State has power to make regulations as to premises licensed for cinematograph exhibitions. By reg. 2 of 1909, no building is to be used for cinematograph exhibitions unless it be provided with an adequate number of clearly indicated exits placed in such positions, and so maintained, as to afford safe and speedy egress for the audience. Under s. 5 of the same Act application was made to the Cambridge Justices who passed this building as suitable for its purpose. All the provisions of s. 158 of the Public Health Act, 1875, have been complied with, but the borough council are acting upon a statute which has nothing to do with the matter, inasmuch as s. 36 of the Public Health Acts Amendment Act, 1890, relates to the user of a building, and not to its erection. It is not sufficient for the council honestly to believe that the erection of the building on the particular site would be an infringement of an Act of Parliament. Reasonable grounds must also be shown. The council's view as to the narrowness of streets adjoining the theatre is not a reasonable ground for rejecting the plans as infringing s. 36 of the Public Health Acts Amendment Act, 1890. The council are really attempting to restrict the use of their property by the landowners.

(1) (1900) 64 J. P. 724.
(2) (1901) 18 Times L. R. 1.
(3) [1911] 2 K. B. 361.
(4) (1911) 75 J. P. 385.

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Rex v. *Bexhill Corporation, Ex parte Cornell* (1) shows that the council, in refusing to approve the plans on the grounds they assigned, acted ultra vires in matters not within their competence.

DARLING J. In this case the plans in question were submitted to the local authority who have power, under s. 158 of the Public Health Act, 1875, to approve or disapprove of them. They have disapproved of them, not on the ground that they are in breach of any byelaw, but because they allege that, although the plans absolutely comply with all the byelaws, yet if the building were built according to those plans it would, in their opinion, infringe s. 36 of the Public Health Acts Amendment Act, 1890. [His Lordship read the section.]

It appears to be perfectly plain that this building, if it were erected according to the plans presented, would be thoroughly adapted to its purpose, and provided with sufficient means of ingress and egress. The local authority would consider it quite satisfactory if it were to be erected on some other site. But they object because Sidney Street is very narrow, and they propose to widen it because it is so narrow as to be dangerous. In my view, in case of non-compliance with s. 36 of the Public Health Acts Amendment Act, 1890, no matter whether the plans are approved or not, an offence would be committed against that section. By sub-s. 4 of s. 36 it is provided that: "Any person who being the occupier or manager, or in the case of a building let for any period less than one year the owner, of any building used as aforesaid, uses the same or suffers the same to be used in contravention of this section, or fails to comply with the provisions of this section in respect thereof, shall for every such offence be liable to a penalty not exceeding twenty pounds." It would be very difficult to say that a person who had provided a sufficient number of exits would commit an offence simply because people might come out into Sidney Street, when it was crowded with traffic, instead of into

(1) (1911) 75 J. P. 385.

Sussex Street or Hobson Street. Yet the local authority have come to the conclusion that there is insufficient provision of ingress and egress because of the possibility or probability of Sidney Street being crowded. The proper rule to be deduced from the cases cited relating to the grant of mandamus seems to be that the writ will not be granted if the local authority bona fide and on reasonable grounds, believe that the erection of a proposed building will not comply with, or will contravene, some Act of Parliament. Did the Cambridge Corporation disapprove of the plans merely in the bona fide belief that the erection of this theatre would be in contravention of the Act of Parliament, and without regard to the consideration that they could only do so if their belief was also based on reasonable grounds ? The question of bona fides need scarcely be discussed, since belief appears to imply good faith ; and it is almost tautologous to speak of believing in good faith. What is more practical is to inquire whether the local authority believed on reasonable grounds that the erection of the proposed building would be an infringement of an Act of Parliament. The Act is not infringed if the building is supplied with ample, sufficient and convenient means of ingress and egress having regard to the character of the building. This does not mean that regard must be had only to the size and number of the doors, since they might open into a dangerous place, as on to a railway or tramway, or, as in Cambridge, on to the edge of a river. In a case like that it would be no answer to a summons under s. 36 of the Public Health Acts Amendment Act, 1890, to say that there were sufficient means of egress. That would not settle the question at all. But it does not appear reasonable to say, seeing that there are ample means of egress into Hobson Street and Sussex Street, as well as into Sidney Street, that this Act of Parliament would be infringed, if the proprietors of the site were allowed to erect the building in accordance with the plans. Supposing some one had been knocked down in Sidney Street after leaving the theatre, and the proprietors were summoned under s. 36 of the Act of 1890, the real gravamen of their offence would

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be, not that they did not provide means of egress into Sidney Street, but that they ought to have closed that means of egress, and kept open the means of egress into Sussex Street and Hobson Street. I cannot, therefore, say that the mere erection of this building in accordance with the plans would be an infringement of s. 36 of the Act of 1890, and the rule must be made absolute.

SANKEY J. I agree. I entirely share my Lord's views with regard to the question of bona fides, and am satisfied that the corporation in disapproving the plans acted, as they thought, in the interests of the borough. I rest my judgment, however, on the fact that there must be reasonable grounds for believing that the erection of the building would lead to the infringement of an Act of Parliament.

BRANSON J. I agree, and for the same reasons. No doubt the corporation in refusing to pass the plans thought they were doing the best they could for their borough. The ground on which the rule should be made absolute is that there was no reason for the belief that the building erected in accordance with the plans would constitute an infringement of the Public Health Acts Amendment Act, 1890, or lead to any infringement of that statute. When s. 36 of that Act speaks of supplying the building with means of egress and ingress it means, prima facie, egress and ingress into the public streets. It is possible to conceive a case in which the public street into which egress is provided is a cul-de-sac, or for some reason dangerous, and in such a case different considerations might arise. But there is nothing of that kind in the present case. Sidney Street is one of the important streets of Cambridge, and the other streets, though they are not very wide, are still ordinary streets. Really the only reason suggested for saying that egress into these streets is not amply sufficient and convenient is that there is a great amount of traffic in them. If there cannot be sufficient means of egress into a street because it is one in which there is heavy traffic, it would be very difficult to have any place

of public resort in many of the thoroughfares of London. I cannot think that on such grounds the corporation were entitled to find that this building was likely to lead to the infringement of s. 36 of the Public Health Acts Amendment Act, 1890, and I agree that this rule must be made absolute.

Rule absolute.

Solicitors for Cambridge Corporation: *Sharpe, Pritchard & Co., for J. E. L. Whitehead, Town Clerk, Cambridge.*

Solicitors for applicants: *Kenneth Brown, Baker, Baker.*

G. H. K.

THE KING *v.* GRAHAM-CAMPBELL.

Ex parte GREENWOOD.

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Nov. 2, 3, 16.

Mental Deficiency—Mental Deficient—Maintenance in Institution—Person liable to maintain—Order to maintain made by Judicial Authority—Enforcement of Order—Judgment Summons—Mental Deficiency Act, 1913 (3 *& 4 Geo.* 5, *c.* 28), *s.* 13, *sub-s.* 2.

Where a judicial authority other than a judge of a county court makes an order on a person liable to maintain a mental deficient to contribute towards his maintenance in an institution, the order may be enforced by a judgment summons against that person in a Court of summary jurisdiction, and that Court may adjudicate the amount due.

RULE NISI to a metropolitan police magistrate.

On September 2, 1915, an order was made by George Alexander Hardy, being a judicial authority under the Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), requiring William George Collins, of 1 Wharf Road, Notting Hill, to pay to the London County Council, being the local authority for the county of London for the purposes of the above Act, 1*s.* a week by way of contribution towards the expenses of the maintenance of Louise Rose Collins, a defective, so long as she should remain in Springfield Lodge, Denmark Hill, being an institution for defectives under the above Act. No payments under the order were made by the said W. G. Collins.

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In order to enforce payment under s. 13, sub-s. 2, of the Act the solicitor to the London County Council on December 16, 1920, served on him a judgment summons to appear personally before the Court of summary jurisdiction sitting at Bow Street to be examined on oath by the Court touching the means he had had since the date of the order, and to show cause why he should not be committed to prison for having made default. Particulars were given showing that the amount due was 1*l.* 6*s.* This procedure was that hitherto followed by the London County Council in enforcing such orders.

At the hearing of the summons the learned magistrate declined to adjudicate on the ground that the defendant might desire to contest both the making of the order and the amount due under it, and that such an issue could not properly be tried on a summons which appeared to assume both facts: that the proper remedy was distress, and that in default of distress he had no power either to commit the defendant to prison or to call on him to show cause why he should not be committed to prison.

On April 26, 1921, a rule nisi was obtained by the prosecutor, an official of the London County Council, calling upon the magistrate to show cause why he should not proceed to hear and determine the said judgment summons.

Giveen and *Roland Burrows* showed cause. The magistrate rightly dismissed the summons. By s. 13, sub-s. 1, of the Mental Deficiency Act, 1913, a judicial authority may make an order requiring the defective or, as in the present case, any person liable to maintain the defective—namely, Collins—to contribute to the defective's support in the institution. By sub-s. 2 such order may "be enforced against any property of the defective or person liable to maintain him . . . . if made by [a] judicial authority, as if it were an order for the payment of a civil debt made by a court of summary jurisdiction." As the sub-section provides a specific remedy any other remedy is impliedly excluded. The meaning of the words above cited is that an order can only be made against the property of the defective or that of the person liable to

maintain him. Consequently the only remedy against Collins is against his property, by distress, and not against his person by committal, at least in the first instance.

An analogous case is that of *Scott* v. *Morley* (1) in which it was held that the liability in contract of a married woman under s. 1, sub-s. 2, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), "in respect of and to the extent of her separate property" could not be enforced by committal.

It is true that sub-s. 2 of s. 13 of the Act goes on to say that the maintenance order may be enforced "as if it were an order for the payment of a civil debt made by a court of summary jurisdiction." The provisions of the Summary Jurisdiction Acts with regard to such orders are as follows. By s. 19 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43): "Where an order requires the payment of a sum of money . . . . to be levied . . . . by distress. . . . . Provided . . . . that whenever it shall appear . . . . that the issuing thereof would be ruinous to the defendant . . . . or . . . . that he hath no goods" a committal order may issue. Neither of these two cases has been shown here; therefore that section does not authorize committal, nor does s. 21 of the same Act. On the assumption that by s. 6 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the maintenance order is "deemed to be a civil debt," it is, by s. 35, enforceable in default of distress by imprisonment, only where the defendant, having the means to pay, has neglected to do so. But it is not a "civil debt" within that section, because, to constitute it a civil debt there must have been a previous adjudication of the exact amount due. The statement in the order of the amount due is not an adjudication. In this case there should have been a summons for the amount due, an adjudication, a warrant of distress, an inquiry as to the debtor's means, and then, if he was found able to pay and had neglected to pay, a warrant of committal. On this summons the magistrate could only adjudicate the amount due and issue a warrant of distress.

Roome in support. The magistrate was wrong in dismissing

(1) (1887) 20 Q. B. D. 120.

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the summons. The procedure adopted was that prescribed by rr. 36–39 of the Summary Jurisdiction Rules, 1915, under the heading "Civil Debt Proceedings," and by r. 39: "A judgment summons may issue although no distress warrant has been applied for." Had the Legislature intended that a distress should issue in the first instance s. 13, sub-s. 2, of the Act of 1913 would have provided that the order should be enforceable "as if it were an order for the payment of money," and not "as if it were an order for the payment of a civil debt," the words actually used. The magistrate was wrong in saying that the position of the defective and of the person liable for his maintenance is the same; s. 13, sub-s. 2, expresses the distinction, which is obviously necessary, and should be read: "Any such order may . . . . be enforced against any property of the defective," or, in the other case, "may . . . . be enforced against . . . . [the] person liable to maintain him." To support the respondent's reading of the sub-section it would be necessary to read in several words. Under sub-s. 4 of s. 13 a guardian who has done his duty and agreed in writing to contribute to the maintenance can clearly be sent to prison in default without a distress warrant being first issued, and there is no reason why one who puts the authorities to the trouble and expense of forcing him to do his duty should be treated more leniently. Under sub-s. 2 the authorities proceed as if they had obtained an order for payment from a Court, while under sub-s. 4 there is no need for such assumption.

With regard to the point that there might be a dispute as to the amount due and that it should be previously decided, as it would be in the ordinary case of a judgment summons, magistrates have been in the habit of deciding this question themselves in these cases, in the rare instances when it has been raised, thus preventing a multiplicity of proceedings.

Cur. adv. vult.

Nov. 16. The judgment of the Court (Lord Trevethin C.J., Sankey and Branson JJ.) was read by

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BRANSON J. In this case an officer of the London County Council obtained a rule nisi calling upon Mr. Graham-Campbell, one of the metropolitan magistrates, to show cause why he should not hear and determine a judgment summons issued by the Council's officer against one Collins in respect of the default of Collins in the payment of certain sums payable by him under an order made against him under s. 13 of the Mental Deficiency Act, 1913.

On September 2, 1915, a judicial authority under the Mental Deficiency Act, 1913, made an order upon Collins requiring him to pay to the County Council 1*s.* per week by way of contribution towards the maintenance of his daughter Louise Rose Collins, a defective, so long as she should remain in a certain institution. Collins made default in payment, and on December 16, 1920, a judgment summons was issued against him in the ordinary form, which contained particulars showing the amount due under the order from June 17, 1920, to December 16, 1920 (that is, six months prior to the issue of the summons), as 1*l.* 6*s.* The summons was duly served and the parties appeared, but the learned magistrate declined to adjudicate thereon upon the ground that a judgment summons was not the proper procedure for the enforcement of the said order. His view, as laid before us, was that upon the true construction of s. 13 of the Mental Deficiency Act, 1913, that Act imposed no personal liability upon the person liable to maintain the defective, but only a liability upon his property; and, further, that even assuming that a personal liability was imposed, it could not be enforced by judgment summons without first proceeding by complaint in order to get an adjudication upon the question whether the order was properly made and whether any instalments were really in arrear.

We are of opinion that the learned magistrate was wrong on both points. Sect. 13 of the Act, after providing in sub-s. 1 that where an order has been made that a defective be sent to an institution a judicial authority may make an order requiring the defective, or any person liable to maintain him, to contribute towards the expenses of his maintenance in the institution, proceeds in sub-s. 2 (so far as material) as

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follows: "Any such order may, on the application . . . . of an officer authorised by the local authority, be enforced against any property of the defective or person liable to maintain him . . . . if made by [a] judicial authority, as if it were an order for the payment of a civil debt made by a court of summary jurisdiction." The first portion of the sub-section defines the objective, and the second the manner in which that objective is to be reached. In our opinion the enactment renders liable both the property of the defective and the person liable to maintain him. To give the words the meaning attributed to them by the learned magistrate it is necessary to read into the sub-section the words "of any" between the words "or" and "person" in the phrase. We can find no reason for departing from the meaning yielded by the words as they stand. No reason could be assigned by counsel for limiting the liability of a person liable to maintain a defective so that he should be liable only to the extent of such property as he might possess. The reason for the limitation in the case of the defective is, of course, obvious. It was suggested in argument that the language of sub-s. 4, which provides that any sum which the parent or guardian of a defective has agreed in writing to contribute towards the expenses of the defective's maintenance shall be recoverable summarily as a civil debt, and which clearly treats the parent or guardian as personally liable, as distinguished from liable to pay out of property, gives ground for the assumption that sub-s. 2, where different language is employed, intended a different result. But this is not so. Sub-s. 2 is concerned with imposing a liability upon a person apart from any agreement; sub-s. 4 with the method of enforcing a liability already undertaken by agreement, and the language is necessarily different. It is in our opinion clear that under sub-s. 2 of s. 13 an order made under sub-s. 1 may be enforced against the person upon whom it is made and not merely upon his property.

Then as to the method of enforcement. The effect of sub-s. 2 is to give to an order made by a judicial authority the same status as is possessed by the order of a Court of

summary jurisdiction for the payment of a civil debt. It cannot be questioned, and was not questioned before us, that such an order by a Court of summary jurisdiction is properly enforceable by judgment summons. The same is, therefore, true of the order of the judicial authority, which the statute enacts may be enforced in the same manner. The difficulty apparently felt by the learned magistrate—namely, that a case might arise in which the making of the order, or the amount due thereunder, might be disputed—might equally occur in the case of an attempt to enforce an order of a Court of summary jurisdiction by judgment summons, and if it should arise must be dealt with in the same way by adjudicating upon the dispute on the hearing of the judgment summons. The provisions of the Mental Deficiency Act, 1913, s. 13, sub-s. 2, on the subject admit in our opinion of no doubt, and effect must be given to them.

The result is that the rule must be made absolute.

Rule absolute.

Solicitor for prosecutor: *D. P. Andrews.*

Solicitor for respondent: *The Treasury Solicitor.*

W. L. L. B.

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Nov. 8.

STIRK AND SONS, LIMITED *v.* HALIFAX ASSESSMENT COMMITTEE.

Poor Rate—Supplemental Valuation List—Fixed Percentage Increase on non-residential Properties—Resolution of Committee—No Individual Valuation—Invalidity—Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103), *ss.* 25, 26.

An Assessment Committee passed a resolution to the effect that a supplemental valuation list should be made, and that in such list the gross and net values for certain classes of property, in which residential property was not included, should be increased by the addition of 25 per cent. to the gross and net values in the existing list, and that this order should be sent to the Overseers. A supplemental valuation list was drawn up in accordance with this resolution, no individual valuation being made, and a rate was made and served upon the respondents (among others) as occupiers. On a case being stated by the Court of Quarter Sessions:—

Held, by the Divisional Court, that the Quarter Sessions were entitled to find (1.) that no supplemental valuation had been made within the Union Assessment Committee Act, 1862, and (2.) that the list which purported to be a valuation list was unfair, unequal and bad in law.

Sect. 26 of the Union Assessment Committee Act, 1862, gives to the Committee and Overseers no greater powers in making a new valuation list than the Overseers have in making the original list under s. 14 of that Act—namely, "to make a list of all rateable hereditaments in the parish with the annual value thereof respectively."

CASE stated by the Court of Quarter Sessions for the West Riding of Yorkshire.

On January 14, 1920, the Assessment Committee of the Halifax Union passed the following resolution, "Resolved, that pursuant to the provisions of the Union Assessment Committee Act, 1862, this committee hereby orders and directs that a supplemental valuation list should be made for each and every Parish or Township in the Union, and that such supplemental list shall contain a list of all rateable properties in the said Parish or Township contained in the valuation list in force, under the following descriptions, namely:—Mills or factories, workshops, warehouses, shops where the tenant does not reside on the premises, or, where so residing, are over 52*l.* gross rental, public houses over 52*l.* gross rental, cinemas, music halls, and other places of entertainment: And that in such supplemental list the rateable

value appearing in the valuation list in force shall be increased by 25 per centum over the rateable value of each individual assessment of properties of the description aforesaid and that with the addition of such 25 per centum the rateable value of each individual assessment as aforesaid shall be inserted in such supplemental valuation list in substitution for the rateable value appearing on the existing valuation list as aforesaid: Further, that the gross estimated rental of each of the properties of the descriptions aforesaid so inserted in the said supplemental valuation list shall be such a sum as is arrived at by adding to such rateable value a percentage of the same amount as was allowed in respect of the properties of the descriptions aforesaid in the existing valuation list: And further that this order be sent to the overseers of the several parishes or townships in the Union."

On February 14, 1920, a supplemental valuation list in and for the parish of Halifax in the Halifax Union, was made by the Overseers of the Poor for the parish of Halifax. There was no evidence of any individual valuation of any of the rateable hereditaments having been made, but the supplemental list was arrived at by adding 25 per cent. to the gross and net of such hereditaments in the previous list as were included in the said resolution, together with the hereditaments contained in the Schedule attached thereto (Table 1), which the overseers dealt with on their own initiative.

Table 1 was headed:—"Statement shewing the classes of property to which 25 per cent. was added, although not specified in the order of the Assessment Committee." It then set out the following classes of property—Banks, offices, clubs, stables, lodging houses, restaurants, garages, billiard rooms, markets, parcels offices, school and education offices, golf clubs, technical school, quarry and workshop, bonding warehouses, etc.

On April 1, 1920, a rate for the relief of the poor was made in accordance with the above supplemental valuation and demand therefor was duly made on Messrs. Stirk & Sons

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in respect of certain hereditaments of which they were the occupiers. On June 1, 1920, Messrs. Stirk & Sons gave written notice of objection to the Valuation List on the grounds that the imposition of 25 per centum advance in assessment was unfair and irregular. The following facts were agreed between the parties for the purposes of the case: (1.) The resolution of January 14, 1920, above set out; (2.) that each resolution was considered by the Overseers, who then made the supplemental valuation list in question; (3.) that such supplemental valuation list was arrived at by adding 25 per cent. to the gross and net in the previous list; and (4.) that there were included in the supplemental valuation list the properties specified in the resolution and those contained in the Schedule in Table 1 (supra), but that residential property other than that attached to business premises was not included.

Messrs. Stirk & Sons, having failed to obtain relief, gave notice of appeal to Quarter Sessions. They contended (*a*) that no proper separate valuation of the hereditaments in question had been made at all; (*b*) that the resolution and supplemental valuation were a violation of the principles of the Parochial Assessment Act, 1836; (*c*) that the supplemental valuation list and the rate based thereon were bad in law; (*d*) that the supplemental valuation list was bad, as not having been made in accordance with ss. 25 and 26 of the Union Assessment Committee Act, 1862; (*e*) that the fact that all dwelling houses not attached to trade premises were excluded from the list and from the 25 per centum increase under the resolution, was of itself sufficient to show that the list was unfair, unequal and incorrect.

It was contended on behalf of the Assessment Committee, (*a*) that there was no evidence that the assessment of Messrs. Stirk & Sons was excessive, and that consequently they were not entitled to relief; (*b*) that the supplemental valuation list had been duly made by the overseers in accordance with their statutory powers and was valid.

The Court of Quarter Sessions found as a fact that no individual valuation had been made of any of the hereditaments concerned for the purpose of the supplemental valuation list, and that the effect of the increase of the value of the premises in accordance with the resolution was to make the valuation list unfair and unequal; they held that the supplemental valuation list and the rate laid thereon was bad in law, and that the applicants (Messrs. Stirk & Sons) were entitled to the relief claimed. They accordingly allowed the appeal. From this decision the Assessment Committee appealed, and the question for the opinion of the Court was whether the Court of Quarter Sessions were right in allowing the appeal or not.

The Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 26, is as follows: "The Committee by their order may from time to time, where they see fit, upon the application of any person aggrieved by the valuation list in force in any parish, or where they themselves think the same expedient, direct a new valuation of all or any of the rateable hereditaments in such parish, and a new valuation list in substitution for such valuation list as aforesaid, or a supplemental list in substitution for any part thereof or in addition thereto, to be made by the overseers; or the committee may, with such consent as aforesaid, appoint a person for such purposes; and the committee may, in directing such new valuation, and the making of such new or supplemental valuation list, give and make all such or the like directions and provisions in relation thereto as they are authorised under this Act to give and make in relation to the valuations and valuation lists first directed and authorised to be made under the Act." This and other sections of the Act, so far as material, are fully set out in the judgment.

Talbot K.C. and *J. A. Greene* for the Assessment Committee (appellants). The complaint of the respondents is that the residential assessments have not been raised, and that therefore they and other owners of business premises

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have been unfairly treated by the Assessment Committee. That being so, they should have given notice under the Poor Rate Act, 1801, s. 6, and the Union Assessment Committee Act, 1862, s. 18, to the occupiers of residential properties as "the persons interested." The form of notice, which must specify the grounds of objection, is laid down in the Union Assessment Committee Act, 1862, s. 18; and (s. 19) the Committee will then hold meetings to hear objections.

[SANKEY J. It would be scarcely possible for Messrs. Stirk & Sons to have served all householders.]

They might have served two or three persons for the purpose of testing the matter. In *Reg.* v. *Kent Justices* (1) Cockburn C.J. pointed out "that it is an essential preliminary to his" (i.e., the person objecting) "being heard both before the committee and at the sessions, as to those persons whose rating he proposes to contrast with his own, that he shall have given notice to them, inasmuch as their assessments may be raised."

[He referred also to *Anderson* v. *Plomesgate Union.* (2)]

It is not suggested that the assessment here is too high, and there is no evidence in the present case that the method adopted has produced an unfair or erroneous result. The Assessment Committee considered that all business property had appreciated by 25 per cent.

By s. 20 of the Union Assessment Committee Act, 1862, the Committee may correct and approve a valuation list, and (s. 26) may direct the making of a new valuation and of a new valuation list, and may give all such directions as they are authorized under the Act to give on the original valuation. It is under this section that the Committee purported to act. In doing so they have exercised their judgment, and there is no evidence here that any entry in the list is unfair or incorrect.

Waugh K.C. and *R. A. Shepherd* for the respondents. No notice was served by us upon "the persons interested,"

(1) (1870) L. R. 6 Q. B. 132, 136.
(2) (1906) Konstam's Rating Appeals, vol. ii., 407.

because no point arose as to any individual rating, and therefore no such notice was necessary; the Committee chose to assess one class of occupiers, excluding another class, and that is unfair.

[He referred to *Rex* v. *West Ashford Union*. (1)]

No individual valuation was made and the Committee failed to exercise a discretion in regard to particular hereditaments.

The Union Assessment Committee Act, 1862, provides as to the method of making a valuation, and a "valuation" portends a consideration of the facts of each particular case. Sect. 26 of that Act does not empower the Committee to decide the matter by resolution at all. It is for the Overseers to decide in each individual case the gross annual value of the property. The Committee's powers are strictly defined in the various sections of the Union Assessment Committee Act, 1862, and s. 26 confers upon them no greater power in making a supplemental list than they had in making the original list under s. 14 of the Act. The character and age of each property ought to have been considered. It cannot be suggested that the same considerations apply to a mill which is 25 years old, as to a new mill. In the former case a much larger amount would have to be allowed for the cost of repairs and other points of difference would also have to be considered. There has been no proper supplemental valuation list within the meaning of the Act.

Talbot K.C. replied.

SANKEY J. [after stating the facts and the proceedings in the Court below continued:] The question for the opinion of this Court is whether the Court of Quarter Sessions were right in allowing the appeal. Mr. Talbot, on behalf of the Assessment Committee, says this: First of all consider the two real points upon which the applicants, Messrs. Stirk & Sons, grounded their objections and were successful. They never relied on the point that their particular

(1) (1907) Konstam's Rating Appeals, vol. ii., 624.

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assessment was excessive. The only points they took were: (1.) That the assessment was improperly made, and (2.) that other assessments—that is to say, the assessment of the residential properties—had not been raised. With regard to the second point, Mr. Talbot says that no notice had been given by Messrs. Stirk & Sons to any of the persons who were the occupiers of those residential properties. I desire to point out, not because it is conclusive of the case at all, but because it shows the inconvenience of this procedure, how difficult it would have been for Messrs. Stirk & Sons to have given such notice. We are not told how many occupiers of residential properties there are in the Halifax Union, but it seems to me that it would be most inconvenient, if not impossible, for Messrs. Stirk & Sons to have given notice to every one of such persons upon the ground that they, too, ought to have had their assessments raised. Mr. Talbot says in answer that notice might have been given to two or three occupiers in order to test the matter. That would have tested the matter as far as the two or three are concerned, but it would have made no difference to the vast majority of the residential occupiers whose assessments had not been raised at all. The objection however to this procedure goes far deeper than that, and it is necessary in order to explain the view that we take of the case, to go somewhat carefully into the sections which bear upon this matter. Before doing so I should like to say that there is not the slightest suggestion that the Assessment Committee here did anything which was wrong and improper in any moral sense, indeed their action may have been highly convenient; but it appears to me (1.) that they have not here made a valuation list within the meaning of the Act at all, and (2.) that they have not, as they ought to have done, made an assessment upon individuals but only upon classes. With regard to the first of those two points—namely, that they have not made a valuation list within the meaning of the Act at all—that depends upon the proper construction to be placed upon certain sections of the Union Assessment Committee Act of 1862. Now it is to be observed that the

persons who have the primary duty to prepare a valuation list are the Overseers, and by s. 14 of that Act it is enacted: "Subject to any order as hereinafter referred to which may be made by the committee"—that is the Assessment Committee—"the overseers of each parish in the union shall, within three calendar months after the appointment of such committee, make a list of all the rateable hereditaments in such parish, with the annual value thereof respectively." That looks as if, at any rate in the original List, the Overseers have to make a List and consider each of the individual hereditaments respectively, and to set each out with the annual value. Sects. 18 and 19 show the method by which objections can be made to the List, and it is necessary to refer to s. 18: "Any overseer or overseers of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time" (after a certain time) "give to the committee and to the overseers a notice in writing of his objection. . . . ." Sect. 19 governs the procedure of the Committee when it meets to hear objections. So far I have only dealt with the original List, provided for by s. 14, and I again repeat that it seems to me to be the duty of the Overseers to "make a List of all the rateable hereditaments in such parish with the annual value thereof respectively." It is perfectly true that s. 20 gives the Committee power to correct any List, and when corrected to approve the same. These sections deal, as I have said, with the original Valuation List; but from time to time the List may be altered, and s. 25 is the section which gives power to the Overseers to prepare supplemental valuation lists in case of addition to and alterations in the rateable property of the parish. Sect. 26 (probably the most important section in this case) is the section under which the Committee in this case have acted. It provides that "The committee by their

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order may from time to time, where they see fit, upon the application of any person aggrieved by the valuation list in force in any parish, or where they themselves think the same expedient, direct a new valuation of all or any of the rateable hereditaments in such parish and a new valuation list as aforesaid, or a supplemental list in substitution for any part thereof or in addition thereto, to be made by the Overseers." Stopping there for a moment, that gives a power to the Committee to direct the Overseers to make a new or a supplemental valuation, or they may appoint a person for the purpose of making it, and then, "the committee may in directing such new valuation and the making of such new or supplemental Valuation List, give and make all such or the like directions and provisions in relation thereto as they are authorised under this Act to give and make in relation to the valuations and valuation lists first directed and authorised to be made under the Act." Thus s. 26 does not give them any greater power in making the new Valuation List than they had in making the original Valuation List. Now it is said on behalf of Messrs. Stirk & Sons, first of all, that the Committee have no power to pass a resolution of the character they did. Mr. Talbot's answer to that is that that really does not carry the matter any farther, because even if they have not power under s. 26 to pass such a resolution, they have power under s. 20 to correct the Valuation List and when corrected to approve the same. In my view the resolution goes a good deal farther than that, and the material question in this case is this: Was any Valuation List made at all within the meaning of the Act? I quite agree that it may be difficult in some cases to draw the line; it may be quite easy to put cases where a Committee, although purporting to make a list, make and produce something which is not a list at all; it is equally easy to put cases upon the other side where in purporting to make a list they make and produce a proper list, but it appears to me that in this particular case it cannot be said that they have made a list within the meaning of the Act at all. They

do not purport to have made a list of "all the rateable hereditaments in the parish with the annual value thereof respectively." All that they have done is to pass a resolution that a fancy figure should be placed opposite to each particular hereditament in the Valuation List. When I say "fancy figure" I do not at all use the word "fancy" in an offensive sense; I use it in this sense—that they have not considered any individual hereditaments. All that they have done is to consider classes of hereditaments, not individual hereditaments. To show how that works out, I do not think it is at all necessary to have evidence other than that of the facts and the list itself. [His Lordship read the agreed facts and continued:] As Mr. Waugh has pointed out, the effect of putting 25 per cent. both on the gross and the net was to apply an arbitrary rule of thumb to every property without considering either the situation of the property, its character or its age. Take, for example, the illustration given by Mr. Waugh, of a mill. I do not know what the life of a mill is, but assume for the sake of argument that there is a mill 25 years old and another mill which is quite a modern one: it seems to me that evidence is not wanted to prove that to put a 25 per cent. increase on both those properties is not making a real valuation of them. Take the addition to the gross valuation: can it be suggested that if you have a mill of 4 years of age and another mill of 25 years of age the repairs of both will be identical? Surely it is not necessary to call evidence with regard to that. Mr. Talbot says that there was no evidence upon which the Quarter Sessions could come to the conclusion that the Valuation List was unfair and unequal. In my view this is a case where the matter speaks for itself. When you consider the various classes of property, upon the hypothesis that they must be scattered about here and there in the different wards of the township, and when you consider that these properties must be of different age, you are driven to the conclusion that the Quarter Sessions had evidence before them upon which they were not only entitled, but bound, to decide that

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the effect of the increase in the value of the premises in accordance with the said resolution was to make the Valuation List unfair and unequal.

I am of opinion, therefore, that in this particular case there was evidence upon which the Quarter Sessions could find (1.) that the valuation was unfair and unequal, and (2.) that no individual valuation had in fact been made of any of the hereditaments concerned for the purpose of the supplemental valuation list; and there being evidence that there was no individual valuation made of any of the hereditaments, the Quarter Sessions were entitled to say that this was not a proper supplemental valuation list within the meaning of the Act. For both those reasons—first of all, that there was no supplemental valuation list within the meaning of the Act, and, secondly, that the list which purported to be a valuation list was unfair and unequal, I hold that the Quarter Sessions were right, and that Messrs. Stirk & Sons were entitled to the relief claimed, and that this appeal should be dismissed.

BRANSON J.: I agree, and I do so upon both the grounds which have been stated by Sankey J. All that I need add is this: It has been urged upon us that the Assessment Committee has a free and unfettered discretion under the statute to make its list according to the best of its ability. I think that is true, but the Committee has fallen into the error which has been made by other people who have a general discretion; instead of exercising its discretion, as it should do, in relation to particular hereditaments, it has fettered that discretion by making a general rule, and has sought to apply to a number of hereditaments, which must be subject to all sorts of varying considerations, the one inflexible rule that the value is to be deemed to have risen by 25 per cent. That, in my opinion, is not the way in which either the Overseers in the first instance, or the Assessment Committee, in sitting to revise their results, should exercise their functions under the Act. The result is that this document which purports to be a supplemental

valuation list is not in fact a valuation list. Upon that ground, and also for the other reasons, which I need not repeat, I agree that this appeal must be dismissed.

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Appeal dismissed.

Solicitors for appellants: *Robbins, Olivey & Lake, for Longbotham & Sons, Halifax.*

Solicitors for respondents: *Helliwell, Harby & Co., for Jubb, Booth & Helliwell, Halifax.*

F. P. F.

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Nov. 10.

Local Government—Housing of working Classes—Notice to Owner to execute Work within twenty-one Days—Reasonableness—Discretion of Magistrate—Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *ss.* 35, 86—*Housing, Town Planning, &c., Act*, 1919 (9 & 10 *Geo.* 5, *c.* 35), *s.* 28.

By the Housing, Town Planning, &c., Act, 1919, s. 28, sub-s. 1, "if the owner of any house suitable for occupation by persons of the working classes fails to make and keep such house in all respects reasonably fit for human habitation then, ... the local authority may serve a notice upon the owner of such house requiring him within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such works as may be necessary to make the house in all respects reasonably fit for human habitation: provided that, if such house is not capable without reconstruction of being rendered fit for human habitation, the owner may, within twenty-one days after the receipt of such notice, by written notice to the local authority declare his intention of closing the house for human habitation, and thereupon a closing order shall be deemed to have become operative in respect of such house. Any question arising under this proviso shall, in case of difference between the owner and the local authority, be determined by the Local Government Board." By sub-s. 2: "If the notice is not complied with, the local authority may . . . . do the work," and (sub-s. 3) "any expenses incurred by the local authority under this section may be recovered in a Court of Summary Jurisdiction."

Sub-s. 5: "In this section 'owner' shall have the same meaning as in the Public Health Act, 1875."

Sub-s. 6: "This section shall be deemed to be part of Part II. of the principal Act":—

Held, by the Divisional Court, that in proceedings by a local authority under s. 28, sub-s. 3 (supra), the Court of Summary Jurisdiction is the

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proper tribunal to determine whether the local authority has complied with the conditions laid down in the earlier sub-sections: and even if the notice served on the owner specifies twenty-one or more days as the time allowed for the execution of the work, it is within the discretion of that tribunal, having regard to all the circumstances of the case, to decide whether the notice is a reasonable notice or not. The notice referred to in s. 28 (supra) is not an "order" within the meaning of the Housing of the Working Classes Act, 1890, s. 35, and therefore does not form any ground for an appeal under that section (s. 35) to a Court of Quarter Sessions.

CASE stated by Metropolitan Police Magistrate.

The appellant was the Town Clerk to the Council of the Metropolitan Borough of Bermondsey. The respondents were "owners" within s. 28 of the Housing, Town Planning, &c., Act, 1919, of some five hundred houses, to which the provisions of s. 28 applied, situate in the district for which the Council were the local authority under the section. (1) Between January 1, 1920, and April 23, 1920, the Council served on the respondents one hundred and nineteen notices requiring work to be done to certain of these houses. The majority of these notices were served under the provisions of the Public Health Act, 1891. On April 23, 1920, a large number of the above notices had not been complied with, and, to the knowledge of the parties, most of the works required under them was still unexecuted. On April 23, 1920, the Council, as the local authority under the section, served on the respondents twenty-eight notices under s. 28, sub-s. 1, of the Housing, Town Planning, &c., Act, 1919, in respect of five houses in Spa Road and twenty-three houses in Ernest Street, both in the Borough, to all of which the provisions of the Act applied, as well as two notices under the Public Health Act, 1891. Each of the notices under s. 28 of the Act of 1919, required the respondents to execute the work specified in the notice relating to the particular house within a period of twenty-one days, being the maximum period permitted by the section. The respondents did none of the works specified in the twenty-eight notices of April 23, 1920, or, at any rate, none that was

(1) Housing, Town Planning, &c., Act, 1919 (9 & 10 Geo. 5, c. 35), s. 28. See headnote.

material. The Council thereupon, purporting to act under s. 28, sub-s. 2, executed the work themselves. The carrying out of the work covered a period extending over thirteen weeks. On November 15, 1920, the Council served twenty-three notices upon the respondents for expenses incurred in connection with the Ernest Street notices, amounting in all to 654*l.*, and in default of payment twenty-three complaints were made and twenty-three summonses taken out under s. 28, sub-s. 3, to recover the expenses incurred. (1) These complaints were heard by the magistrate on March 3 and 23, 1921. At this hearing the amount claimed was reduced to 623*l.*, interest having been inadvertently included in the demands and summonses. The respondents resisted the claims on the ground that the notices did not provide a reasonable time for the execution of the works, and they contended that in considering whether or not such time was reasonable, the magistrate ought to consider all the circumstances of the case and particularly :—

(*a*) the work remaining to be done on April 23, 1920, under such of the previous one hundred and nineteen notices as had not been complied with ; and,

(*b*) the total amount of work required under all the notices served on April 23, 1920.

On behalf of the Council it was submitted that the question of the reasonableness of the time specified on each of the notices was not a matter within the jurisdiction of the magistrate, the Legislature having, by s. 28 of the Housing, Town Planning, &c. Act, 1919, left it entirely to the discretion of the local authority, and, further, that the reasonableness of the time specified in a particular notice must depend upon the work specified in that notice, without reference to any other notices, whether of earlier or of even date.

According to the appellant's evidence, although the time specified in the notice was twenty-one days, it did not follow that the time given would be limited to that period, and the respondents admitted that the Council was in the habit, in cases where the work had been started within the time

(1) See headnote.

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specified in the notices, of extending the time so specified for completion.

The magistrate held that the respondents could not by any reasonable effort or diligence have complied with the twenty-three Ernest Street notices, and that the period of twenty-one days specified in the notices was not in all the circumstances a reasonable time: and that the notices were consequently invalid. He accordingly dismissed the twenty-three complaints. Upon the application of the appellant a case was stated for the opinion of the Court, the question being whether on the facts stated the magistrate was right in law.

Travers Humphreys for the appellant. The Housing of the Working Classes Act, 1890, Part II., empowers local authorities to make closing orders and demolition orders in the case of houses occupied by the working classes, which are unfit for human habitation, or are obstructive in the sense of stopping ventilation, etc.; and by s. 35 any person aggrieved by an order of the local authority under this part of the Act may appeal to a Court of Quarter Sessions, no proceedings being taken in the meantime under the order. (1) This section was amended by the Housing, Town Planning, &c., Act, 1909, s. 18, sub-s. 4, which substituted a right of appeal to the Local Government Board in the case of an owner served with an

(1) Housing of the Working Classes Act, 1890, s. 35, sub-s. 1, as amended by the second schedule to the Housing, Town Planning, &c., Act, 1909: "Any person aggrieved by an order of the local authority under this part of this Act may, if he is not entitled to appeal to the Local Government Board against the order, appeal against the same to a Court of Quarter Sessions, and no work shall be done nor proceedings taken under any order until after the appeal is determined or ceases to be prosecuted; and section thirty-one of the Summary Jurisdiction Act, 1879, respecting appeals from Courts of Summary Jurisdiction to Courts of Quarter Sessions shall apply with the necessary modifications as if the order of the local authority were an order of a Court of Summary Jurisdiction."

Sect. 86: "(1.) An order in writing made by a local authority under this Act shall be under their seal and authenticated by the signature of their clerk or his lawful deputy. (2.) A notice, demand, or other written document proceeding from the local authority under this Act shall be signed by their clerk or his lawful deputy."

order for demolition; but as regards other orders under Part II., the owner's right of appeal to Quarter Sessions under s. 35 of the Act of 1890 still remained.

In 1909, for the first time, power was given by the Housing, Town Planning, &c., Act, 1909, s. 15, sub-s. 3, to the local authority to serve notice on the landlord to execute repairs, and, (sub-s. 6) a landlord might appeal to the Local Government Board against any such notice. A similar right to appeal to the Local Government Board was given to the landlord in the case of a closing order by s. 17, sub-s. 6, of the same Act, and in the case of an order for demolition by s. 18, sub-s. 4. Thus the appeal tribunal in the case of those orders was no longer the Court of Quarter Sessions, but the Local Government Board; in the case of other orders, the right of appeal to the Quarter Sessions still remains. The Housing, Town Planning, &c., Act, 1919, s. 28, deals with the power of the local authority to serve notice on the owner to do repairs. The time given must not be less than twenty-one days, and if that time is allowed in the notice, the magistrate has no discretion to refuse the order.

By sub-s. 6 this section (s. 28) is to be deemed part of Part II. of the principal Act—namely, the Housing of the Working Classes Act, 1890. The magistrate should therefore have made the order and left the owner to exercise his right of appeal under s. 35 of the Act of 1890 to Quarter Sessions, if he was dissatisfied. It is true that s. 86 of the Act of 1890 distinguishes between the terms "notice" and "order," but this distinction only relates to the validity of the form of the "notice" or "order," as the case may be. The terms are for all practical purposes interchangeable.

[He referred to *Arlidge* v. *Hampstead Metropolitan Borough*. (1)]

The Legislature here has enacted that the decision of the Court of Summary Jurisdiction is subject to an appeal by the owner to Quarter Sessions. The same right is given in the cases of works ordered under the Public Health Act, 1875: *Pearce* v. *Maidenhead Corporation*. (2)

(1) [1916] 1 Ch. 59. (2) [1907] 2 K. B. 96.

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Such a right of appeal, given under the Housing of the Working Classes Act, 1890, is not impliedly repealed by the subsequent Act and is still open to the owner: *Mittelmann* v. *Denman*. (1)

Secondly, the magistrate had only to consider whether any particular notice allowed a reasonable time for the execution of the work, not whether the notices collectively were reasonable. The Act of 1919 was passed for the benefit of tenants, and a tenant should not be allowed to suffer because a landlord owns several houses in the same district, and thereby finds a difficulty in completing the work in time.

Eustace Hills K.C. and *Inman* for the respondents. The statutes prior to the Housing, Town Planning, &c., Act, 1919, have no bearing on the present case. The Act of 1919 extended the existing powers of local authorities so as to affect "owners" as defined in the Public Health Act, 1875; it also took away the power of landlords to "close" a house in respect of which repairs were ordered, by giving notice of closure to the local authority. The only provision in the Act of 1919 for an appeal by an owner is contained in the proviso to s. 28, sub-s. 1, which gives a right of appeal in one case only to the Local Government Board. Under s. 28, sub-s. 3, the Court of Summary Jurisdiction is the proper Court to decide whether the notice is reasonable, and the onus is upon the local authority to show service of a reasonable notice, if the expenses of the work are to be recovered.

The Housing of the Working Classes Act, 1890, s. 35, is confined in its effect to "orders" and contains no mention of any appeal from "notices": the two are clearly distinguished in s. 86 of that Act. The Housing, Town Planning, &c., Act, 1909, s. 15, applies only to landlords, and the respondents here are not landlords, but owners. It is reasonable that an appeal to the Local Government Board should be granted (s. 15, sub-s. 6, of the Act of 1909) where landlords are concerned. The Act of 1919, on the other hand, which concerns "owners," leaves the question of reasonableness to be decided by the Court of Summary Jurisdiction. If the

(1) [1920] 1 K. B. 519.

notice is not reasonable, the local authority cannot recover. As to the second point raised by the appellants, the whole circumstances must be looked at. Here the number of notices requiring the respondents to do work was very large, and the work could not be done in the time given.

Travers Humphreys replied.

DARLING J. This case seems to me to turn entirely upon the meaning of s. 28 of the Housing, Town Planning, &c., Act, 1919, and in my opinion the other statutes, that is to say, the Housing of the Working Classes Act, 1890, and the Housing, Town Planning, &c., Act, 1909, have very little bearing on it. The Act of 1919, s. 28, provides that if a house of the kind to which the Act applies is not fit for habitation by working people, steps shall be taken by the owner to have it made fit, and the word "owner" as therein defined includes the persons here ordered to do these repairs. [His Lordship read s. 28, sub-s. 1, and continued:] Thus power is given under that section to the local authority to serve a "notice" upon the owner, and throughout the section there is no mention whatever of an order. The notice which is to be served requires the owner to execute such works as may be necessary to make the house fit for habitation, and requires him to do this within a reasonable time. The mere fact that the notice gives the owner twenty-one days for the execution of the work is not in itself sufficient, it must give him a reasonable time, "not being less than twenty-one days." It may be conceived that the owner will not obey the notice. If so, s. 28, sub-s. 2, provides that "the local authority may at the expiration of the time specified in that notice" do the work required to be done. That is what happened here: the owner did not comply with the notice, and the work was done by the local authority. Proceedings were then taken by the local authority under sub-s. 3, which provides that "any expenses incurred by the local authority under this section may be recovered in a Court of summary jurisdiction."

Apart, therefore, from any other statutory provisions, s. 28 provides that the magistrate shall decide whether any

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expenses may be recovered; and in order to decide that he must satisfy himself that a notice was given and that it allowed twenty-one days for the doing of the work. If it did not allow twenty-one days, he would not be able to go further into the matter. He would have to say that there was not such a notice as the statute required, because it was not a twenty-one days' notice. But supposing it to be a twenty-one days' notice, it seems to me that it does not even then of necessity comply with the statute, because s. 28, sub-s. 1, provides for the service of "a notice upon the owner requiring him within a reasonable time . . . . specified in the notice to execute such works." The time which is to be specified must be a reasonable time, and it seems to me, therefore, that the magistrate is bound to inquire not merely whether twenty-one days' notice has been given, but whether the twenty-one days' notice is a reasonable notice. He cannot decide that simply upon being told the number of rooms in the house and their size: he must know the nature of the dilapidations. Then when he knows the nature of the dilapidations he must consider and take evidence as to the length of time required to do these repairs and to put the house in proper order for a workman to live in. When he hears that evidence, it is surely material for him to inquire both as to the number of workmen available in the local labour market at the time when they will be required by the owner, if the repairs are to be completed in the given period. If the magistrate is satisfied that workmen are not available in sufficient numbers, how can he say that a reasonable notice has been given simply because a twenty-one days' notice has been given? It is to be observed, and I think it is a material observation, that when this local authority did the work themselves they could not do it within twenty-one days. Some part of it took twelve or thirteen weeks, and a great deal of it took half of that time. It seems to me, therefore, that if the magistrate had ordered the owner to do this work in twenty-one days he would have ordered the man to do what he could not do,—what is shown by the course of events to have been physically impossible. In these circumstances

I come to the conclusion that if he had the right to inquire into the matter at all, he certainly had the right to go into all the circumstances in the way in which he did. It is said that he may not go into these circumstances because of s. 28, sub-s. 6, which says: "This Section shall be deemed to be part of Part II. of the Principal Act." The principal Act (the Housing of the Working Classes Act, 1890), s. 35, does not contain any clear and plain words applicable to this case. It says: "Any person aggrieved by an order of the local authority under this part of this Act, may appeal against the same to a Court of Quarter Sessions." By the Housing, Town Planning, &c., Act, 1909, a right of appeal is given to an owner in some matters to the Local Government Board, but in this matter Mr. Travers Humphreys says that the proper appeal, if there be an appeal, is to Quarter Sessions under s. 35 of the Act of 1890, which provides (sub-s. 2) that "notice of appeal may be given within one month after notice of the order of the local authority has been served on such person." Now this right of appeal, if it lies at all, lies only from an "order," and an "order" is defined by s. 86 of the Act of 1890, as follows: "The order in writing made by a local authority under this Act shall be"—it does not say "may be"—"under their seal and authenticated by the signature of their clerk or his lawful deputy." Now this is not an order of the local authority, it is only a notice; but Mr. Travers Humphreys says that the two are interchangeable terms. The same section (s. 86) goes on to define "notice": it says: "A notice . . . . from the local authority shall be signed by their clerk or his lawful deputy." Here the respondents were served with a notice. Now no appeal is given under the Act from a notice, but only from an order, and this, to my mind, is not an order at all. I think that if one looks at the Act of 1919 alone, the intention of the Legislature is plain; but if one turns to Part II. of the Act of 1890, in order to find out what right of appeal there is, one is led into confusion, and can come to no decision without doing violence to language which, if it be interpreted in an ordinary plain way, can be understood. Therefore, I think

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that s. 28, sub-s. 6, is wholly inapplicable so far as it relates to the question whether the magistrate had a right to inquire into what the notice required to be done, and into the circumstances in which it could possibly be complied with. For these reasons I think that the magistrate was perfectly right when he investigated the whole of the circumstances; and that there is no legal ground for allowing the appeal.

SANKEY J. I agree. The appellant is the Town Clerk of the Metropolitan Borough of Bermondsey; and the respondents are the owners, within the meaning of s. 28 of the Housing, Town Planning, &c., Act, 1919, of a number of houses in Ernest Street, Bermondsey. Now on April 23, 1920, the Council of the Borough of Bermondsey, who were the local authority under s. 28, served on the respondents notices in respect of twenty-three houses in Ernest Street, as being houses which were out of repair, and not reasonably fit for human habitation. Each of the said twenty-three notices required the respondents to execute the works specified in the notice relating to the particular house within a period of twenty-one days; and that period of twenty-one days is the minimum period permitted by the section. The respondents did none of the work, and the Council thereupon, in pursuance of their powers under the section, executed the work themselves; having executed the work on November 15, 1920, they served twenty-three demands upon the respondents for the expenses that they had incurred, amounting altogether, as they said, to a sum of 654*l.* 15*s.* 4*d.* As the respondents did not pay any part of this sum, twenty-three summonses were taken out against them under sub-s. 3, s. 28, to recover the expenses incurred. The learned magistrate duly heard the evidence, and he found that the respondents could not, by any reasonable effort or diligence, have complied with the twenty-three notices; he held that the period of twenty-one days specified in the notices was not, in all the circumstances, a reasonable time. He then came to the conclusion that the notices were

consequently invalid; and dismissed the complaints, stating this case for the opinion of the High Court.

Mr. Travers Humphreys, who has argued the case for the appellants, takes two points: (1.) that the magistrate had no jurisdiction to inquire into the reasonableness of the notice; (2.) that the magistrate misdirected himself as to what was a reasonable notice under the circumstances.

The main argument on the first point, that the magistrate had no jurisdiction to inquire into the reasonableness of the notice, is advanced in the following way. It is said that the magistrate was not the proper person to inquire into the notice at all; that if the respondents were aggrieved by the notice, their proper procedure was to appeal; that they have neglected to do, and, therefore, they cannot now complain of the invalidity of the notice. It is pointed out how inconvenient the procedure adopted in the present case would be, because, unless there is an appeal, it is not possible to ascertain whether the notice is bad until the hearing before the magistrate; and if the magistrate then decides that the notice is bad, the local authority probably have done all the work, incurred all the expense, and will not be able to recover; whereas if proceedings could be taken earlier to test the invalidity of the notice, it could be put right, and the burden placed upon the proper shoulders.

I sympathise with that statement of the inconvenience, and believe it to be a correct one; but we have to see whether there is such a right of appeal, and Mr. Travers Humphreys admits that it can only be found in one particular case. Sect. 28 of the Act of 1919, sub-s. 6, provides: "This section"—that is s. 28—"shall be deemed to be part of Part II. of the principal Act," that is to say, of the Housing of the Working Classes Act, 1890; Part II. of that Act begins with s. 29, and is headed "Unhealthy Dwelling Houses"; and ss. 32, 33, 34, and 35 are sections referring to closing orders and the demolition of such houses. Sect. 35 reads as follows, and I am reading it not as it was originally enacted, but as it has been altered by the second schedule of the Housing and Town Planning Act, 1909: "Any person aggrieved by

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an order of the local authority under this part of this Act may, if he is not entitled to appeal to the Local Government Board against the order, appeal against the same to a Court of Quarter Sessions; and no work shall be done nor proceedings taken under any order until after the appeal is determined or ceases to be prosecuted." Now, says Mr. Travers Humphreys, there is a right of appeal against the order of the local authority, and by the Act the word "order" is interchangeable with the word "notice" and, therefore, as s. 35 gives the right of appeal against an order, it must be held to give the right of appeal against a notice; and, therefore, there is a right of appeal to Quarter Sessions from the notice referred to in s. 28 of the Act of 1919.

I think it would be straining language, even if the matter rested there, to construe the word "order" in s. 35 as including a "notice." An order is an entirely different thing from a notice; but we are not left without guidance as to the meaning of "order," and as to the meaning of "notice," because by s. 86 of the same Act, that is, the principal Act of 1890, there are different regulations made with regard to orders and with regard to notices. Sect. 86 provides (sub-s. 1) that "an Order in writing made by a Local Authority under this Act shall be under their seal and authenticated by the signature of their clerk or his lawful deputy"; sub-s. 2 provides: "A notice, demand or other written document proceeding from the Local Authority under this Act shall be signed by their Clerk or his lawful deputy." Therefore, not only does s. 86 differentiate between "order" and "notice," but we know from the facts in this case that the particular document which was the foundation of the proceeding under s. 28 of the Act of 1919 was a notice which was signed by the Town Clerk, and therefore within s. 86, sub-s. 2, not being an order under the seal of the Council, as provided by s. 86, sub-s. 1. Therefore it appears to me that the main argument advanced goes. It cannot be said that an appeal is given in the case of a notice, because by s. 35 of the principal Act an appeal is given in the case of an order.

But apart from that, one would have thought, looking

at the section itself, that there was no appeal. If you look at the section, it does not give the appeal contended for. It is only by bringing in an Act of Parliament and straining the meaning of a word in that Act that any show of reason is obtained for the argument. It is to be observed that under s. 28, in respect of a certain matter, a right of appeal is given. There is a right of appeal in the proviso to s. 28, sub-s. 1: "If such house is not capable without reconstruction of being rendered fit for human habitation, the owner may, within twenty-one days after the receipt of such notice, by written notice to the local authority declare his intention of closing the house for human habitation, and thereupon a closing order shall be deemed to have become operative in respect of such house. Any question arising under this proviso shall, in case of difference between the owner and the local authority be determined by the Local Government Board." Therefore it seems to me that the Act expressly provides for an appeal in one case, and omits any reference to an appeal in the other.

When the matter first came before the learned magistrate, one of the necessary facts the Council had to prove, in order to make their case successful, was the service of the proper notice. Mr. Travers Humphreys contends that the magistrate had a limited jurisdiction, and that if he saw a notice which was bad upon the face of it, say a twenty days' notice, the minimum required by the statute being twenty-one days, he could at once decide: "There is no notice at all." On the other hand, if it was twenty-two days' notice, according to the argument the magistrate would be powerless, because he cannot go into the reasonableness of it. I read s. 28, sub-s. 1, as laying it down that a notice requiring the work to be done within a reasonable time is a condition precedent to the Council taking steps under sub-s. 3; and I think they have to prove that such notice was given, and, for the reasons which I have endeavoured to give, that the magistrate had a right to inquire into the reasonableness of it. If the position

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contended for by Mr. Travers Humphreys is desirable (and I confess it seems to me, as at present advised, to be so), it ought to be achieved by Parliament altering the Act, rather than by the judges straining the language of the Act to attain the desired end.

With regard to the second point—namely, that the learned magistrate misdirected himself as to what was a reasonable time—I can see no evidence of misdirection. I entirely adopt, if I may be allowed to say so, the language of my Lord on this part of the case. The learned magistrate, after hearing the matter, found in para. 11 of the case that the respondents could not by any reasonable effort or diligence have complied with the twenty-three Ernest Street notices. I think that he was entitled to find that. I can see no evidence of misdirection; and for the reasons given by my Lord, I am of opinion that the second point also fails.

For these reasons I think the case must be answered in favour of the respondents.

BRANSON J. I agree. The matter came before the learned magistrate under sub-s. 3 of s. 28 of the Housing, Town Planning, &c., Act, 1919, upon summonses issued on behalf of the local authority to recover (to use the words of that subsection), "expenses incurred by the local authority under this section." Now, in order to show that they were seeking to recover expenses incurred by them under this section they must show that they had complied with the conditions laid down by the earlier sub-sections of s. 28. The first of those conditions is that they shall have served upon the owner of the house a notice requiring him within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such work as may be necessary to make the house in all respects reasonably fit for human habitation. Prima facie, reasonableness is a question of fact and prima facie when a tribunal has to decide whether persons are entitled to recover a sum of money provided they have acted reasonably, that tribunal is the proper one to decide upon the question of reasonableness, which is one of the conditions precedent to the

right to recover. For these reasons I think that prima facie the Court of Summary Jurisdiction before whom the expenses may be recovered is the tribunal to determine whether the conditions precedent have been complied with, and amongst those, whether the notice given was a notice fixing a reasonable time for the doing of the work. But it is said that so to hold would be to depart from the principles adopted in former Acts, and also to give no effect to sub-s. 6 of s. 28, under which it is urged there is a right of appeal to Quarter Sessions. I do not think that that argument is sound. When one looks at s. 35 of the Act of 1890, which is the Act referred to in s. 28, sub-s. 6, that Act gives a right of appeal from an order of the local authority. In my opinion the notice which can be given under s. 28, sub-s. 1, of the Act of 1919 is not such an order. I do not myself place much reliance on the definition in s. 86 of the Act of 1890, which seems to me to relate rather to the formalities to be adopted in making an order or giving a notice than to distinguish between an order and a notice as such. I think that the notice referred to in s. 28, sub-s. 1, is not an order, because it does not order anybody to do anything; it is simply a notice given to the owner, which he may disregard without any penalty or any infraction of the notice at all. In its essence then it is in no sense an order, and not being an order it does not come within s. 35 of the Act of 1890, and does not form any ground for an appeal to Quarter Sessions.

Mr. Travers Humphreys' second point was that even assuming the magistrate had, as I think he had, jurisdiction to entertain the question as to whether the time specified in this notice was a reasonable time or not, he had misdirected himself by taking into consideration things with which in law he had nothing whatever to do. On this I agree with what has already been said. I think that when he is turning his mind to the decision of the question whether the time specified was a reasonable time, he must take into account all the surrounding circumstances of the case; he must look at the amount of work to be done; he must look to the supply of labour in the district; and possibly he may have to look to

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the individual circumstances of a particular house, as in the case suggested by Mr. Travers Humphreys in argument, where a person is confined to bed in that house with an infectious disease; all these matters he may have to consider. Mr. Travers Humphreys says that the magistrate gave a good deal of weight in arriving at his conclusion to the time which was in fact occupied by the local authority in doing the repairs, when the owners had failed to do them within the specified time. I think that the time which the local authority actually took to do the work cannot possibly be excluded as a matter which the magistrate ought not to regard. No doubt, if there are explanations of any delay, he must take them into consideration; but the fact that it took the local authority in some cases as much as thirteen weeks to do the repairs which they were calling upon the owners to do in three weeks, is a matter which the magistrate was entitled to take into account. That would be so, I think, in any case, but more particularly in the circumstances of the present time when one knows the urgent demand for dwelling houses, and is entitled to assume that a local authority, having the interests of its district at heart, would put forth every reasonable effort to get the work done in the shortest possible time.

For these reasons I agree with the judgments which have been delivered, and further that this appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *F. Ryall.*

Solicitors for the respondents: *Dawson & Co.*

F. P. F.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1921 *June* 14, 15. C. A. *Nov.* 21, 22.

EDWARDS *v.* METROPOLITAN WATER BOARD.

[1920. E. 604.]

Public Authorities Protection—Action of Negligence—Limitation of Time—Execution of Act, Duty or Authority—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By s. 1 of the Public Authorities Protection Act, 1893: "Where . . . . any action . . . . is commenced . . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority . . . . (*a*) the action . . . . shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of. . . . ."

It was admitted that the defendants were under a statutory duty to supply water to the inhabitants in an area of 550 square miles and to maintain pipes necessary for conveying the water. They had a large number of pumping, filtering and storage depots which had to be supplied with consumable stores and materials for repairing and extending their main pipes. They used lorries driven by steam or petrol to take stores to these depots and to bring back empty receptacles which had contained oil and other materials. Main pipes frequently burst and had to be replaced by fresh pipes with the utmost possible speed.

On September 17, 1919, a steam lorry was sent out by the defendants to convey some cast-iron pipes from a central depot to a district depot and to bring back empty casks and drums which had contained oil from the district depot to the central depot. On the return journey the driver of the lorry negligently ran over and injured the plaintiff.

On June 7, 1920, the plaintiff issued a writ claiming damages for the injury:—

Held by Lush J. and, in the Court of Appeal, by Bankes and Scrutton L.JJ. (Younger L.J. dissenting), that no distinction could be drawn between the outward journey and the return journey of the lorry; that it was all one journey, and that it was undertaken directly in pursuance of the defendants' public duty.

Bradford Corporation v. *Myers* [1916] 1 A. C. 242 distinguished.

Trial of Action before Lush J. without a jury.

The plaintiff claimed damages for personal injuries sustained by him through the negligence of the defendants' servant in the following circumstances.

On September 17, 1919, a steam lorry of the defendants was sent out from a central depot at Battersea to convey

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some six-inch cast-iron pipes to a district depot at Lea Bridge. On the return journey the driver of the lorry negligently ran over and injured the plaintiff. The lorry was returning laden with empty casks and drums which had contained oil and other stores.

The writ was issued on June 7, 1920. The defendants pleaded s. 1 of the Public Authorities Protection Act, 1893. (1) They contended that the sending of the lorry on its outward journey was an act done in pursuance or execution or intended execution of their Acts of Parliament and of their public duty; that no distinction could be drawn between the outward journey and the return journey, but that it was all one journey, and that the neglect or default, if any, of their driver was a neglect or default in the execution of their Acts and of their public duty. They relied on *Clayton* v. *Pontypridd Urban Council*. (2) The plaintiff contended that the case fell within *Bradford Corporation* v. *Myers*. (3)

The superintendent of the defendants' depot at Battersea was called for the defendants. He was also their chief storekeeper. The following extract from his evidence is taken from the shorthand note of the judgment of Bankes L.J. :—

O'Hagan for the defendants. Have the Water Board a large number of pumping, filtering and water-storage depots and buildings which have to be supplied with consumable stores and materials for repairs and extensions? A. That is so.

Shakespeare for the plaintiff. I cannot dispute that the Water Board's lorry was being employed to take stores to Lea Bridge and to bring empties back to the depot at Battersea. They have said it was and I cannot dispute it.

LUSH J. I will ask the witness if that is right. Do you use the steam lorries in order to take stores to these various depots in order that the Metropolitan Water Board may carry out its work and do its duties? A. Exactly, my Lord.

LUSH J. I will just read it, because I want to be sure that

(1) See headnote. (2) [1918] 1 K. B. 219.
(3) [1916] 1 A. C. 242.

I am right. You use these lorries to convey stores to the depots in order to enable the Water Board to perform its duties. A. Yes, my Lord. . . . .

O'Hagan. Would those stores include not only consumable stores but cast-iron pipes and heavy castings for repair purposes ? A. That is so.

LUSH J. What was the load on this lorry ?

Shakespeare. The driver said they were empties, my Lord.

LUSH J. I ought to add that : " and take back empties."

O'Hagan. What had the lorry started with on that day ? A. Six-inch cast-iron pipes.

LUSH J. We are coming now to an important part of the case. This lorry started with six-inch iron pipes ? A. Yes, my Lord.

O'Hagan. And came back, as we know, with empties ? A. Yes.

O'Hagan. And the pipes would be required, I suppose, for repairing the many miles of piping which the Board have in London. A. That is so.

LUSH J. This lorry had been to Lea Bridge ? A. Yes.

O'Hagan. What had it taken there ? A. A lot of six-inch cast-iron pipes.

O'Hagan. What was it bringing back, if anything, when it left Lea Bridge and was going along the Farringdon Road ? A. What we call packages ; empty casks and drums.

O'Hagan. Would those be oil drums ? A. Yes.

O'Hagan. Those would be empty drums and casks in which you had taken stores on a previous occasion ? A. That is so.

O'Hagan. I do not think my learned friend will dispute this : Does the Board serve a district of some 550 square miles ? A. That is about it.

O'Hagan. And has the Board depots and pumping stations scattered all over that area ? A. Yes.

O'Hagan. As well as a system of pipes spread all over that area ? A. Yes.

O'Hagan. For the purpose of conveying these materials does the Board maintain a considerable fleet of petrol and

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steam wagons? A. Yes; it uses a fleet of petrol and steam wagons to carry the stores.

O'Hagan. When pipes are wanted for repairing work are there many occasions upon which they are wanted with great speed? A. That is so.

O'Hagan. I mean that you have many cases of pipes bursting? A. Yes.

LUSH J. They are often wanted very urgently? A. Yes.

June 14, 15. *Shakespeare* for the plaintiff.
O'Hagan for the defendants.

LUSH J. having held on the facts that the defendants were liable, and having assessed the damages at 285*l.*, continued: The third question is a serious one for the plaintiff, for it is said that because of the Public Authorities Protection Act, 1893, he is too late in bringing this action. What happened was this. The lorry when it caused the accident was not being used for carrying pipes from headquarters at Battersea to the depot of the defendants at Lea Bridge, but was returning from Lea Bridge to which it had first carried pipes, and was also bringing back some empty casks and oil drums. The pipes had been conveyed to Lea Bridge for the direct purpose of enabling the defendants to supply water for the public use and to perform their statutory duties. It is true that it may be said that the return journey of the lorry was not made directly for the purpose of enabling the defendants to perform their statutory duties, nor was the taking away of the empties in one sense directly necessitated by the performance of those duties. But I cannot draw any distinction between the two journeys, and it appears to me that they formed one journey.

Was this work, therefore, done in the performance of the defendants' statutory duties? The Public Authorities Protection Act, 1893, says in s. 1: [His Lordship read the section. (1)] In *Bradford Corporation* v. *Myers* (2) the corporation, who were authorized by statute to carry on the undertaking of a gas company, and were bound to supply

(1) See headnote. (2) [1916] 1 A. C. 242.

gas to the inhabitants, had power to sell the coke which they produced in manufacturing the gas, and they entered into a contract with Myers to sell him a ton of coke. In the course of delivering the coke in pursuance of this private contract their servant was negligent and injured Myers' shop window. The House of Lords held that the act done was not done "in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority" within the meaning of s. 1 of the Act, but was done in the carrying out of a private contract which they were not bound to enter into. I think the present case is entirely different. It is not true to say that the defendants need not have carried these pipes to the depot unless they thought fit. It is true to say that in the *Bradford Case* (1) the corporation need not have sold coke to Myers. The defendants here could not have carried on their undertaking or performed their duty without carrying the pipes to the depot. The work done was directly in performance of their public duty. In my opinion the present case more closely resembles the case of *Clayton* v. *Pontypridd Urban Council* (2) which was decided by me. There a meter was being fixed by the defendants in a newly-occupied house, and through the negligence of their servants gas escaped which resulted in an explosion which injured the plaintiff. The defendants were the gasworks undertakers in their district. I held that the defendants in fixing the gas meter were acting in the execution of their statutory duty and that the Public Authorities Protection Act applied, and that *Bradford Corporation* v. *Myers* (1) did not apply. Both in the present case and in *Clayton* v. *Pontypridd Urban Council* (2) there was an act done, not to carry out some other contract which the authority had chosen to make, but solely for the purpose of performing a statutory duty. That being so I think the Act applies and that this action was commenced too late, and there must be judgment for the defendants.

Judgment for defendants.

The plaintiff appealed.

(1) [1916] 1 A. C. 242.

(2) [1918] 1 K. B. 219.

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Shakespeare for the appellant. The respondents cannot claim the protection of the Act for negligence or default of what kind soever, but only for negligence or default in the execution of an Act of Parliament, or of a public duty or authority. Therefore care must be taken to define the duty which they have neglected or in which they have failed. The duty they have neglected is the common duty which the driver of a vehicle in a public highway owes to persons lawfully using the highway—namely, a duty to exercise reasonable care and skill in the management of the vehicle. A neglect of that duty is not a neglect or default in the execution of an Act of Parliament, or of a public duty or authority. It is analogous to the duty which the public body was charged with neglecting in *Bradford Corporation* v. *Myers*. (1) The corporation had undertaken and were bound to supply gas; they were also empowered to sell coke; they made a contract for the sale of coke to Myers, the plaintiff in that action; and they were sued for negligence in delivering the coke. Just as the duty of the corporation in that case "emerged from the contract, not from the statute" (see per Lord Atkinson (2)), so here the respondents' duty arose from driving a lorry in a public street, and not from the respondents' statutes. They were under no duty involving the use of lorries. They used lorries for their own convenience, not for any purpose directly referable to the supply of water. The distinction is between acts which a public authority is compellable to do and acts which it is merely permitted to do. This distinction was drawn by Parke B. in *Palmer* v. *Grand Junction Ry. Co.* (3), followed in *Carpue* v. *London and Brighton Ry. Co.* (4) and by the Court of Appeal in *Lyles* v. *Southend-on-Sea Corporation*. (5) These cases were cited as law by Lord Atkinson in *Bradford Corporation* v. *Myers*. (1) An act is compulsory or permissible according as the public have or have not the right to demand its performance. If they have, the act is done in the execution

(1) [1916] 1 A. C. 242.
(2) [1916] 1 A. C. 254.
(3) (1839) 4 M. & W. 749.
(4) (1844) 5 Q. B. 747.
(5) [1905] 2 K. B. 1.

of an Act of Parliament, or of a public duty or authority, and for neglect or default in the performance of that act the public body is protected. Otherwise it is not. If the act is merely ancillary to the execution of an Act of Parliament, public duty, or authority the public body is not protected for neglect or default in performing that act: *Sharpington* v. *Fulham Guardians* (1), approved in *Bradford Corporation* v. *Myers*. (2) "If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. . . . . But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline": *Bradford Corporation* v. *Myers*, per Lord Shaw. (3) The Public Authorities Protection Act restricts the ordinary rights of an injured party and therefore its words must not have more read into them than they express or of necessity imply; they cannot be properly extended so as to embrace an act which is not done in direct execution of an Act of Parliament, or of a public duty or authority: per Lord Haldane. (4) *Clayton* v. *Pontypridd Urban Council* (5) falls short of being an authority in the respondents' favour, for there the meter when fixed became part of the piping through which gas was conveyed to the consumer, and in supplying and fixing the meter the council could hardly be said to be acting otherwise than in execution of their public duty to supply gas. If in the present case the six-inch pipes had been already laid and the accident had happened through negligence in laying them the *Pontypridd Case* (5) would have been in point. It might have been cited in the respondents' favour if this accident had happened while a pipe already laid was in process of being replaced. But upon the facts of this case it affords them no more support than *Bradford Corporation* v. *Myers* (6) would have given if

(1) [1904] 2 Ch. 449.
(2) [1916] 1 A. C. 251, 259.
(3) [1916] 1 A. C. 263, 264.
(4) [1916] 1 A. C. 251.
(5) [1918] 1 K. B. 219.
(6) [1916] 1 A. C. 242.

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the corporation in that case instead of delivering coke which they had sold had been casting it away to get rid of it.

O'Hagan for the respondents. Any act done in performance of a duty directly imposed by an Act of Parliament is an act done in direct execution of the Act. By ss. 42 and 43 of the Waterworks Clauses Act, 1847, and s. 3 of the Metropolis Water Act, 1902, the respondents are bound not only to lay pipes but to keep them charged with water. If a pipe bursts it must be replaced. Then everything done in the way of replacing burst pipes is done in direct execution of those Acts. The respondents must use the most effectual means of repairing their pipes, otherwise the method is left to their discretion; but while acting upon their discretion they are acting in direct execution of their statutes and their public duty. In order that a public authority may have the statutory protection it is not necessary that the method whereby they carry out their public duty should be directly prescribed by the Act they are executing: *Edwards* v. *Vestry of St. Mary, Islington* (1); *Fielding* v. *Morley Corporation* (2); *Jeremiah Ambler & Sons* v. *Bradford Corporation.* (3) If the respondents were carrying a pipe from a central depot to replace a burst pipe in an outlying district they would be acting in direct execution of their Acts. Equally so if they use the more effectual method of keeping stores of pipes at district depots, so that urgent repairs may be promptly executed. The present case is covered in principle by *The Danube II.* (4), where it was held that the Admiralty being under a public duty to make provision for public defence were acting in execution of that duty in towing a battle target from Portsmouth to Scapa Flow.

Shakespeare in reply.

BANKES L.J. In this appeal it is necessary to remember that certain material matters were admitted or assumed

(1) (1889) 22 Q. B. D. 338.
(2) [1899] 1 Ch. 1; [1900] A. C. 133, sub nom. *Fielden* v. *Morley Corporation.*
(3) [1902] 2 Ch. 585.
(4) [1921] P. 183.

without protest. It was assumed without reference to the various statutes that the respondents are under a duty to supply water within their area and to maintain the necessary pipes in a fit state to convey that water. The facts were that this motor lorry which caused the appellant's injuries was sent from a depot of the respondents at Battersea with certain six-inch pipes to another depot at Lea Bridge. When the lorry had discharged the water pipes at Lea Bridge it was there loaded with empty casks and drums and so loaded it was returning to the place from which it started, and in the course of the return journey the unfortunate accident happened.

The first question is whether the learned judge was justified in coming to the conclusion that the pipes were being sent from Battersea to Lea Bridge for the direct purpose of enabling the respondents to perform their duties. That is a matter which might have been the subject of a searching investigation, but what happened was that the superintendent of the Battersea depot, who was also the chief storekeeper of the respondents, was called. He said he had occupied that position since 1907. Mr. O'Hagan began to examine him for the purpose of bringing out the object for which pipes were being sent from one depot to the other and of establishing that it was necessary in the exercise of their statutory duty and obligations that the respondents should keep pipes stored in convenient places throughout their district. Then the following questions were asked and the following answers given. [The Lord Justice read the extract from the evidence set out above, and proceeded.]

It was open to the appellant to question by cross-examination any of the answers given by the witness or any of the inferences which the learned judge would naturally draw from those answers, but he did not do this, and I therefore come to the conclusion that the learned judge was justified in holding that the pipes were being taken from Battersea to Lea Bridge for the direct purpose of enabling the respondents to perform their duties.

Then with regard to the return journey. In my opinion

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if a public authority in direct pursuance of its duties under an Act of Parliament sends out a vehicle with stores to a particular point within its district, and if on the outward journey the authority is protected by the Public Authorities Protection Act, it is equally protected on the journey home. The journey out and the journey home are only one journey. If that is true it makes no difference whether the vehicle comes home empty, or whether the opportunity is taken of loading it at the outward depot with casks or drums previously brought there in the direct execution of the authority's duty.

Mr. Shakespeare endeavoured to bring this case within *Bradford Corporation* v. *Myers.* (1) I think it is clear from that case that a public body does not necessarily enjoy the protection of the statute merely because it is acting under a leave or licence conferred upon it or under a permission granted to it by an Act of Parliament. To entitle it to protection it is necessary that it should be acting in pursuance or execution or intended execution of an Act of Parliament or of a public duty or authority. In my view it does not help much to say that the act must be in " direct " execution of the Act of Parliament or public duty, because that word itself requires explanation. The question in this case is whether the act of sending this lorry on its journey was an act done in pursuance or execution or intended execution of the statutes which impose upon the respondents their duties, or in execution of a public duty. The main duty of the respondents is to supply water for the public living and carrying on business within their area ; but there are many duties incidental to that main duty, and one of these is a duty to keep and maintain their pipes in proper working condition. Consider the various operations necessary to the direct execution of their main duty. A trench must be cut in order to lay a main pipe. In order to lay a new pipe or repair an old one, a man must carry a pipe some short distance, perhaps from a stack of pipes, in order to place it in position. By some means pipes must be conveyed from

(1) [1916] 1 A. C. 242.

the manufactory, or from the respondents' stock, to the point where they are required. No one could deny that each of these operations is in direct execution of the respondents' statutory duty. If a pipe bursts which must be replaced immediately, and a lorry is sent hurriedly from Battersea with a single pipe, it is not disputed that it would be sent in direct execution of the respondents' duty. Then if they in the exercise of a reasonable and prudent discretion think it necessary to keep a store of pipes at each of their depots, is not the vehicle which conveys the pipes to the stores to replenish the stock sent in exercise of the respondents' statutory duty? In my opinion it is impossible to distinguish between sending a vehicle expressly to take a pipe to a place where a main pipe has burst, and sending a vehicle with a number of pipes to replenish a store so that main pipes which have burst may be immediately or quickly repaired. Therefore in my opinion the learned judge was justified upon the materials before him in arriving at his conclusion.

Mr. Shakespeare contended that if in *Bradford Corporation* v. *Myers* (1) the corporation had been moving coke from their gas works in order to get rid of it, and so remove an impediment in the way of executing their statutory duty of supplying gas, the decision of the House of Lords must still have been for the plaintiff. There I join issue. In my view if the corporation had been moving the coke in order to clear their gas works that they might better fulfil their statutory duty the decision of the House of Lords would have been the other way. The basis of the decision was that the plaintiff had entered into a contract with the corporation for the supply of coke and that the damage was done in the course of supplying coke under that contract. The House of Lords drew a distinction between damage done in the direct execution of a public duty or power and damage done in acting on a mere permission or licence to do an act which the public have no right to demand under statutory authority; and they applied the expression "direct"

(1) [1916] 1 A. C. 242.

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to distinguish between supplying gas, which the corporation was bound to do, and making a contract for the sale of coke which the corporation might, but need not make. The grounds of the decision are well stated by Lord Shaw in these words (1): "And I will venture to add, my Lords, that it will be found that the position, not of the one party, but of both parties, must rest on the same foundation. If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matter of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow householders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies." Then he goes on to contrast such a case with the case he is dealing with, and says (2): "But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline." In the present case the duty which the respondents were performing in sending the pipes for the necessary purpose of maintaining a store of pipes at convenient places had the correlative right of the inhabitants of the respondents' district to have a proper and sufficient supply of water. For

(1) [1916] 1 A. C. 263. (2) [1916] 1 A. C. 264.

these reasons I think the judgment of Lush J. was right and this appeal must be dismissed.

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SCRUTTON L.J. I am of the same opinion. The Public Authorities Protection Act, 1893, codified and superseded a very large number of clauses contained in the special Acts of public bodies and providing for notice of action, limitation of time, and for costs. In 1893 all those clauses were swept away as separate and individual clauses, and the Public Authorities Protection Act, 1893, was passed, applying to any action, prosecution or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act, duty or authority. As the Legislature was codifying and replacing a large number of clauses in slightly different language, no doubt it used very wide words. Five years after the Act was passed Lindley M.R. foresaw the difficulties that would arise. "It is not necessary," he said in *Fielding* v. *Morley Corporation* (1), "to consider what cases, if any, do not fall within the Act, although apparently within the words. I add that by way of precaution, because some day there will probably be a great discussion as to what acts or defaults do or do not come within it; but it is sufficient to say we think this case is clearly within the Act." A good many discussions have justified this prediction. There has lately been one in the House of Lords in *Bradford Corporation* v. *Myers* (2), where Lord Buckmaster said: "The difficulty is to draw a line between the class of cases that are within and those that are without the statute, and I am conscious that this opinion does not establish as clear and distinct a line as I should like to see. But the statute itself is so framed that such distinction is not easy, and there may well be cases about which greater doubt may arise and more uncertainty be felt than about the present, which to my mind lies clearly outside the area of the statutory protection." Lord Haldane

(1) [1899] 1 Ch. 1, 4; [1900] A. C. 133. (2) [1916] 1 A. C. 242, 250.

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said (1): "It is often obvious from the words he has employed that the draftsman has had instructions which have been too vague and insufficient to admit of the expression of a comprehensive principle with exactness, or at all. In such a case the Court can only take the particular facts in the case before it, and decide as best it can whether they come within the words, or whether they fall altogether outside them." Lord Haldane went on to lay down a principle to which I will refer later on, and then he said (2): "What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define a priori the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case." I have read these judgments with care and I respectfully agree with Lord Buckmaster and Lord Haldane that I cannot find a clear or distinct line or any exact principle. There are two statements in that case which seem to lay down a principle. Lord Buckmaster said (3): "It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority." Lord Haldane said (2): "I do not think that they"—i.e., the words of the Act—" can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority. . . . . So it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case." The word "direct" is not in the statute. I do not think it would help matters much if it were. I suspect that it comes from the judgment of Romer L.J. in *Jeremiah Ambler & Sons* v. *Bradford Corporation* (4) where the corporation were given a choice between several ways of exercising a power conferred, as

(1) [1916] 1 A. C. 250.
(2) [1916] 1 A. C. 251.
(3) [1916] 1 A. C. 247.
(4) [1902] 2 Ch. 585.

opposed to a duty imposed, upon them by a statute, and the Lord Justice spoke of the act of the Corporation as done directly in execution or intended execution of the authority, contrasting it with acts only indirectly connected with it. I do not myself derive much help from such expressions as "direct," "predominant" or "efficient" cause. Whichever of these words is used to describe that connection between an act and its results which will involve the doer in legal liability, it is extremely difficult to define that point in the chain of causation at which an act ceases to be the direct, predominant or efficient cause of the result. It is very difficult to give any guidance, but a particular case may fall clearly on one or the other side of the dividing line.

In this difficulty I find several decisions of the Court of Appeal referred to in the House of Lords without disapproval, and I propose to follow decisions of the Court of Appeal so treated even though it may not be easy to distinguish them from the ultimate finding or decision of the House of Lords in the particular case in which they were cited. These decisions of the Court of Appeal, not overruled by the House of Lords, bind us to say that it is not essential that an act should be done in discharge of a duty in order to bring the doers within the protection of the Act of 1893. It is enough if it is done in exercise of a power or of an authority provided it is to be exercised for the public benefit. In *Fielding* v. *Morley Corporation* (1) there was no duty on the corporation to make the aqueduct which overflowed; there was a power or an option to make it if the corporation thought fit. That case was affirmed in the House of Lords. In *Jeremiah Ambler & Sons* v. *Bradford Corporation* (2) there was no duty to make the particular structure which caused Bradford Beck to overflow; there was a power, but no duty to make it. Yet in making that structure the corporation was within the protection of the Act. I think Lord Shaw's judgment in *Bradford Corporation* v. *Myers* (3) points to the same conclusion where he says it is not necessary that there should

(1) [1899] 1 Ch. 1; *Fielden* v. *Morley Corporation* [1900] A. C. 133.
(2) [1902] 2 Ch. 585.
(3) [1916] 1 A. C. 242, 262.

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be a statutory duty to do the act the negligent or faulty performance of which causes the injury; it is enough if there is a statutory authority, provided it be a public authority. *Edwards* v. *Vestry of St. Mary, Islington* (1) shows that it is not necessary that the exact way of carrying out the duty of watering streets should be prescribed by the statute.

The facts to which these principles are to be applied are as follows: It is the respondents' duty to provide a suitable supply of water for the householders in London. To do that they have to construct main pipes in which water may be brought within a reasonable distance of the householder. They have not discharged their whole obligation when they have constructed those pipes. They have to maintain and repair them. A pipe bursting suddenly may do great damage if not promptly repaired. For prompt repairs materials must be close at hand. Therefore they maintain stores in various districts where they keep spare pipes for repairs and other materials such as oil for pumping-engines. They have a central depot and district depots and they convey by lorries pipes and oil from the central depot to the district depots. When a lorry has taken pipes to a district depot it has to come back; and when stores have been conveyed in receptacles to a district depot the receptacles must in the course of time be taken away. If I am asked whether a lorry conveying pipes and stores to a district depot and removing empty receptacles from a district depot, or even returning empty, is being employed in the direct execution of the respondents' statutory duty, I say, having carefully read *Bradford Corporation* v. *Myers* (2), that it clearly is. I cannot distinguish between conveying pipes for repairs and oil for pumping-engines; or between conveying full drums of oil to a store and removing empty drums from a store. Each of these acts seems to be a direct execution of the respondents' duty; because in my view the direct execution of the duty includes all incidental acts reasonably necessary for the execution of the duty. This view is not inconsistent with *Bradford Corporation* v. *Myers* (2), and is in accordance with several

(1) 22 Q. B. D. 338. (2) [1916] 1 A. C. 242.

decisions in the Court of Appeal cited in *Myers's Case* (1) and not disapproved by the House of Lords in that case. Those decisions lead me to the conclusion that this appeal fails.

YOUNGER L.J. The respondents have been guilty of an act of negligence, and the appellant is entitled to damages unless the respondents can discharge the burden, which clearly lies on them, of showing that this action was commenced in respect of an act of negligence in the execution of an Act of Parliament and is accordingly out of time by virtue of the Public Authorities Protection Act, 1893.

I refer to the words of Lord Buckmaster in *Bradford Corporation* v. *Myers* (2), following a number of other cases, for the purpose of emphasizing that the Act applies only to a definite class of persons and a definite class of action. Lord Buckmaster says: "While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority." An examination of that case shows that the real ground on which the House of Lords held that the act there complained of was not protected was that the operation which the corporation were at the time carrying out was not one of public obligation but was the fulfilment of a private contract. In the present case it cannot be said that the work upon which the respondents were engaged at the time of the accident to the plaintiff was work of that class. The *Bradford Case* (1) does not so far assist the plaintiff. The question here is whether the work which was being done

(1) [1916] 1 A. C. 242. (2) [1916] 1 A. C. 242, 247.

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with this lorry when the accident happened can within the intendment of this statute be described as an act in pursuance, or execution, or intended execution of an Act of Parliament or of a public duty or authority. Now, whatever may be the meaning otherwise properly attributable to those words *Bradford Corporation* v. *Myers* (1) seems to justify the statement that the act must be in the direct execution of a statute or in the direct discharge of a public duty or authority: and in my judgment the work on which this lorry was engaged at the time of the accident cannot fairly be so described. Even on its outward journey in the morning it was engaged in an operation primarily at least of internal management only—a rearrangement of stock to facilitate the subsequent discharge of the respondents' public duty to lay main pipes and mend burst main pipes. The lorry was then carrying a load of pipes to a centre whence they could be conveniently used for those purposes. On its return journey, loaded with empty casks and drums, the lorry was still engaged in an operation of internal management, but I think nothing else—namely, a rearrangement of stock among the various depots of the respondents, with no immediate reference either direct or indirect to any statutory duty of theirs. The respondents' evidence relating to the use of their lorries leads to these conclusions. It was of the most general description; merely that they kept a fleet of lorries for the convenient transfer of stores from one depot to another. Their case under the statute clearly was that when a lorry was engaged in carrying stores from one depot to another, be they pipes or oil or anything else, the lorry was engaged in the execution or intended execution of the respondents' statutory duty within the meaning of the statute. Lush J. however did not decide the case in the respondents' favour on that ground. And I agree with him in thinking that it could not be so decided. If it could I can see no real limit capable of being set to the exemption granted by the statute to such a body as the respondents. And that there is such a limit is the clear result of the authorities to which reference has already been made.

(1) [1916] 1 A. C. 242.

Lush J.'s view was that the respondents were entitled to the benefit of the statute, not because of the work actually being done or the service actually being rendered by the lorry at the moment of the accident, but because the lorry on its outward journey, at the beginning of its day's work, had been loaded with pipes.

The questions therefore are (1.) whether the lorry when loaded with pipes on its outward journey from Battersea to Lea Bridge was engaged in the discharge of a public duty of the respondents; and (2.) whether if so the lorry must still be regarded as so engaged on its return journey loaded only with empty casks and drums. Now if the accident had taken place on the outward journey I should I think have held, although even then the case would in my judgment have been very near the line, that the respondents were entitled to the protection of the statute. But the second question is much more difficult. I agree, as I have already indicated, with what seems to have been the view of Lush J., that if on the day in question there had been no loading of this lorry with anything but empty casks and drums, the lorry would not have been engaged in the direct discharge of any public duty within the meaning of the Act as interpreted by authority. Is the Court then justified in saying that the mere fact that the lorry was sent out in the morning with pipes so colours its entire operations for the rest of the day that the respondents are with reference to its subsequent activities entitled to a protection which but for its first load they could not claim? Now the burden of proving this defence rests, as I have said, upon the respondents. I have already indicated the nature of the evidence they gave in support of it. It is not directed to the issue as I am now stating it and as Lush J. has decided it. From the evidence the only inference that can, I think, properly be drawn is that the lorry was conveniently employed in the morning to take out pipes and was conveniently employed in the afternoon to bring back empty drums: there is no evidence that that return journey was a prearranged part of the lorry's day, or that it might not in the afternoon just as probably have

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been employed to take empty drums or anything else from Lea Bridge to some third depot instead of coming back with these drums to Battersea from whence it started in the morning. There is nothing to show even that Battersea was the headquarters of the lorry. If that was important to the respondents' case it should, I think, have been proved. In my view, as the case stands the only journey to be considered is that on which the lorry was actually engaged when the accident happened. It may, viewing the case from this angle, make all the difference that the lorry then was loaded and was not empty. Had it been empty the proper inference might well have been that its only real work on that day was to take pipes to the first depot, in which case it would probably be right to say that the occasion for sending it out continued until it returned; but when, as the fact is, it was loaded with other things when the accident happened, on its afternoon journey, there is, I think, no real reason for inferring that the object and purpose of the respondents in sending out this lorry was any more to take pipes to a depot than to bring back empty casks from it.

The burden lies on the respondents to show that when the accident happened they were engaged in the performance of a public obligation. I am one of those who think that the extraordinarily general words of this statute must be most carefully applied if the statute is not to be converted into a general exemption, and this case falls, I think, just outside the line of cases within it. In my judgment the respondents have failed to discharge the onus which is upon them. They have not shown that they are protected by the statute.

Appeal dismissed.

Solicitors for appellant: *Pattinson & Brewer.*
Solicitor for respondents: *Walter Moon.*

W. H. G.

BROOMHALL *v.* PROPERTY AGENTS AND OWNERS, LIMITED.

1921
Nov. 8.

Emergency legislation—Landlord and Tenant—Standard Rent—Determination of—Application to Court—Jurisdiction—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-ss.* 1, 6, s. 12, *sub-s.* 1 (*a*)—*Increase of Rent and Mortgage Interest (Restrictions) Rules*, 1920 [*St. R. & O., No.* 1,261/*L.* 37], *rr.* 1, 4.

The county court has no jurisdiction under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or the Rules of 1920 made thereunder or otherwise to entertain an application to determine as a sole and independent question what is the "standard rent" of a dwelling house within the meaning of the Act.

APPEAL from Brentford County Court.

By an agreement made in October, 1912, the then owner of a dwelling house, No. 9 Richmond Mansions, Twickenham, let to one Horace King the second-floor flat for three years and so on from year to year at the yearly rent of 47*l.* 2*s.* payable quarterly. In that agreement there was no express mention of a cellar or "lock up" in the basement, but the tenant in fact had the use of it. That agreement was determined in 1915.

In 1917 the said owner sold the house to the Property Agents and Owners, Ld., the present appellants.

By an agreement dated November 10, 1920, the appellants let to Harold George Broomhall, the present respondent, the said flat and the lock up in the basement for three years and so on from year to year at the inclusive monthly rent of 8*l.* 15*s.*, being at the yearly rent of 105*l.*

A dispute arose between the appellants and the respondent as to the amount of the "standard rent" of the premises let to the respondent within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1 (*a*); the respondent alleging that it was the rent paid on August 3, 1914, under the letting to King—namely, 47*l.* 2*s.* a year; and the appellants contending that it was the rent paid by the respondent—namely, 105*l.* a year.

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In these circumstances the respondent by his solicitor sent to the Registrar of the county court and to the appellants notice dated May 18, 1921, of an application to the county court in the following terms: "In the matter of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, ... Take notice that I intend to apply to the court on Friday, the 27th day of May, 1921, at the hour of 2 in the afternoon: To determine the standard rent of certain premises to which the above-named Act applies at Twickenham and being a flat and lock up in the basement known as No. 9 Richmond Mansions and comprised in certain property known as Richmond Mansions, Denton Road, Twickenham."

The county court judge held that he had jurisdiction under the Act and the Increase of Rent, &c. (Restrictions), Rules, 1920, to hear and determine the application; that the letting to King was the same as the letting to the respondent, the former letting like the latter having included the right to a cellar or lock up; and that the rent paid by King was the standard rent of the premises let to the respondent.

The appellants gave notice of appeal on the ground (inter alia) that the judge was wrong in law in holding that he had power under the Act to hear and determine the application to fix the standard rent of the premises.

Holman Gregory K.C. (*Carthew* with him) for the appellants. The county court judge had no jurisdiction under the Increase of Rent, &c. (Restrictions) Act, 1920, or the Rules of 1920 made thereunder, or otherwise, to hear this application to determine as a sole and independent matter the amount of the standard rent of the premises in question. The object of the Act is to prevent landlords from increasing the rents of houses to which the Act applies by more than the amounts permitted by the Act. Sect. 1 provides that if the increased rent exceeds by more than the amount permitted under the Act the standard rent, the amount of the excess shall be irrecoverable from the tenant; s. 2, sub-s. 1, specifies the permitted increases of rent; s. 11 requires the landlord on

being requested by the tenant to do so, to supply him with a statement as to the standard rent; and s. 12, sub-s. 1, defines "standard rent" for the purposes of the Act. Where it is intended that the Court should have jurisdiction to entertain an application under the Act for any purpose, the jurisdiction is given in express terms. Thus, s. 2 provides by sub-s. 1 (*a*) that the tenant may apply to the Court for an order suspending or reducing an increase of rent in respect of an alteration in the house, and that the Court may make an order accordingly; by sub-s. 2 that the tenant or the sanitary authority may apply to the Court for an order suspending an increase of rent in respect of repairs on certain grounds, and that the Court on being satisfied as to certain matters shall order that the increase be suspended; and by sub-s. 6 that any question under the last-mentioned sub-sections shall be determined on the application either of the landlord or the tenant by the county court. These provisions give the county court jurisdiction to hear certain applications as to increased rent. There is no provision in the Act, however, which gives the Court jurisdiction to hear an application in respect of the standard rent; and that implies that it is not intended that the Court should have jurisdiction to hear an application of that kind. There is no provision in the Increase of Rent, &c. (Restrictions) Rules, 1920, which gives the county court the alleged jurisdiction. Rule 1 expressly provides that an application may be made to the county court for certain specified purposes, but these purposes do not include the determination of the standard rent.

Assuming that the county court has jurisdiction to entertain an application to determine the standard rent, this application was not made in the prescribed form and is irregular. The Act by s. 17 provides for the making of rules for the purpose of giving effect to the Act. The Rules of 1920 made under the Act provide by r. 4 that an application under the Rules shall be by a summons in such one of the forms in the Appendix to the Rules as shall be applicable to the case; and by r. 17 that these forms shall be used for

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summonses and applications under the Act and Rules. From the Appendix to the Rules, Forms Nos. 1 and 5, it appears that proceedings for the determination of a question under the Act or Rules must be commenced by a summons under the seal of the county court. No provision is made for commencing proceedings by a notice of application such as was used in the present case. If the landlord over-estimates the standard rent, the proper course for the tenant to take is not to apply to the Court to determine the standard rent, but to refuse to pay the rent claimed by the landlord and thus to compel him to bring an action for the rent, in which the amount of the standard rent would have to be considered.

Disturnal K.C. (*B. L. A. O'Malley* with him) for the respondent. The county court judge had jurisdiction under the Act of 1920 and the Rules thereunder to entertain the application to determine the standard rent of the premises.

Sect. 2, sub-s. 1, of the Act provides that the amount by which the increased rent of a dwelling house to which the Act applies may exceed the standard rent shall be as therein stated, and the sub-section then states the amount of the increase permitted in respect of various matters. In some of these cases the increase is a percentage upon the net rent, which depends upon the standard rent, and in any case in order to fix the time from which the increase may be claimed, it may be necessary to ascertain the standard rent. In order to determine the increased rent it is thus in many cases necessary in the first place to determine the standard rent. The determination of the standard rent is one of the steps to the determination of the increased rent, and when the former has been determined, the latter can often be found by a simple calculation. Sect. 2, sub-s. 6, provides that any question arising under (inter alia) sub-s. 1 shall be determined on the application either of the landlord or the tenant by the county court. That sub-section means not only that any question arising under sub-s. 1 as to the increased rent, but also any question as to the standard rent, upon which the increased rent may be dependent, shall be determined

on an application thereunder by the county court. The application in the present case to determine the standard rent was made with a view to enabling the parties to know what the increased rent would be and the county court judge had jurisdiction to hear it under s. 2, sub-s. 6. Even if it was made without reference to the increased rent the judge had jurisdiction to hear it under that sub-section.

The judge had also jurisdiction to hear the application under the Rules of 1920 which were validly made under s. 17 of the Act. Rule 1 provides that an application may be made to the county court to determine the increased rent, and that as already stated implies that an application may be made to determine the standard rent.

The form of the application was not so different from the form prescribed by the Rules as to be irregular.

HORRIDGE J. This is an appeal from a decision of the learned judge of the Brentford County Court who held that he had jurisdiction to determine the "standard rent" within the meaning of the Increase of Rent, &c. (Restrictions) Act, 1920, of certain premises at Twickenham. The judge was only asked to determine and he only determined what was the standard rent of the premises. He was not asked to determine and he did not purport to determine whether any increased rent was payable in respect of the premises, or any other question arising under the Act.

It was objected on behalf of the appellants that the county court judge had no jurisdiction under the statute or otherwise to entertain the question what was the standard rent as an abstract question, and that he had only jurisdiction to entertain that question in connection with some other question which the Act gave him jurisdiction to decide.

In my opinion, if the county court has any jurisdiction to deal with the question of the standard rent, it has it under s. 2, sub-s. 6, of the Act. Sub-s. 1 of that section states the amount by which the increased rent may exceed the standard rent, and sub-s. 6 provides that any question arising under (inter alia) sub-s. 1 shall be determined on the

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application either of the landlord or the tenant by the county court. If, therefore, in the present case there was any question as to the amount by which the increased rent might exceed the standard rent the county court judge would clearly have jurisdiction to decide it; but no question as to increased rent is here raised. It is said on behalf of the respondent that in order to determine the increased rent it is necessary to take the standard rent into account as one of the elements. That is true; but it does not follow that the county court has jurisdiction to determine as an independent question what the standard rent should be. The Act might have given the Court jurisdiction to determine generally the standard rent of a house, but it has not done so. It has only given the Court jurisdiction to determine what the increased rent should be having regard to the standard rent. Sect. 2 gives the Court no jurisdiction to determine the standard rent as a separate matter, but only as incidental to the determination of the increased rent, and sub-s. 6 of that section merely provides that an application properly made under the section shall be made to the county court.

As to r. 1 of the Increase of Rent, &c. (Restrictions) Rules, 1920, upon which the county court judge relied, that rule does not purport to give to the county court any greater jurisdiction than is conferred upon it by the Act. The rule merely repeats that an application may be made to the county court under certain sections of the Act stating to what particular county court the application is to be made in each case, and the learned judge was under a misapprehension in thinking that it empowered him to hear this application.

In my opinion, on the ground of lack of jurisdiction the county court judge had no power to determine the standard rent of these premises, and this appeal should be allowed.

SHEARMAN J. I agree. The respondent is the tenant of premises which are a dwelling house within the meaning of the Increase of Rent, &c. (Restrictions) Act, 1920. He made an application to the county court in the nature of an

originating summons asking the Court to determine only the amount of the standard rent of the house. The county court judge thought that he had jurisdiction to entertain the application and he accordingly heard and determined it. In my opinion the learned judge had no jurisdiction to entertain an application made for the sole purpose of having the standard rent determined. It was said on behalf of the respondent that the county court had jurisdiction to hear the application under s. 2 of the Act, but that section, which is couched in the clearest terms, refers only to the increased rent, which exceeds the standard rent. The increased rent, which exceeds the standard rent, cannot mean the standard rent itself. Sub-s. 6 of that section, in providing that a question arising under the section shall be determined on the application either of the landlord or the tenant in the county court, only means that a question as to the amount by which the increased rent may exceed the standard rent shall be so determined. No serious attempt has been made to justify the application in question under any other section of the Act. Sect. 12, sub-s. 1, no doubt defines the expression "standard rent" for the purposes of the Act, and the question what is the standard rent of a house for these purposes may have to be dealt with; but that sub-section contains no provision, corresponding to s. 2, sub-s. 6, stating that a question as to the standard rent may be determined on the application of the landlord or the tenant by the county court. The question what is the standard rent is only intended to be dealt with by the Court when it arises in connection with some dispute which can properly be made the subject of litigation. When an action is brought for the recovery of rent, or when an application is made to determine the amount of the increased rent, the judge may have to determine as an incidental question and he may then properly determine what is the amount of the standard rent. The Court has no jurisdiction, however, either under the Act, or even at common law, to entertain an application to determine the mere abstract question what is the standard rent of a house, and expense ought not to be incurred in making an application

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of that kind. The objection has been properly taken by the appellants that the judge had no jurisdiction to hear this application, and the appeal should be allowed and judgment entered for the appellants.

Appeal allowed.
Judgment for appellants.

Solicitors for appellants : *Edell & Co.*
Solicitor for respondent : *F. H. Stollard.*

J. R.

1921
Nov. 24;
Dec. 5.

URQUHART LINDSAY AND COMPANY, LIMITED *v.* EASTERN BANK, LIMITED.

[1921. U. 378.]

Contract—Sale of Goods—Bankers' Letter of Credit—Irrevocable Credit—Repudiation—Anticipatory Breach—Damages.

The plaintiffs entered into a contract with buyers in Calcutta to manufacture and ship machinery by instalments over several months at agreed prices, but subject to a stipulation that should the cost of labour or wages increase, there should be a corresponding increase in the purchase price. The buyers were also to open a "confirmed irrevocable credit" in favour of the plaintiffs with a bank in this country, and to pay for each shipment as it took place. In pursuance of this arrangement the defendants, who were the buyers' bankers in London, wrote to the plaintiffs stating that they would pay bills drawn on the buyers to the extent of 70,000*l.*, the bills to be accompanied by documents and to be received before April 14, 1921, "this to be considered a confirmed irrevocable credit."

The plaintiffs shipped two instalments under the contract and received payment under the letter of credit. The buyers then found that the invoices included an increase in the purchase price on account of wages and material, and instructed the defendants only to pay so much of the next invoices as represented the original prices. The defendants accordingly refused to pay the bill presented on the next shipment and the plaintiffs then cancelled the contract, claiming damages from the defendants as on a repudiation by the buyers:—

Held that, the credit being irrevocable, the refusal of the defendants to take and pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole, and that the plaintiffs were entitled to damages so reckoned. The basis

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of this form of banking facility is that the buyer is taken, as between himself and the banker, to accept the seller's invoices as correct. Any adjustment must be made by way of refund by the seller and not by way of retention by the buyer.

ACTION in the Commercial Court before Rowlatt J.

The plaintiffs were manufacturers of machinery, and the defendants were bankers with various branches in the East, including Calcutta. In December, 1919, the plaintiffs agreed to manufacture for the Benjamin Jute Mills Co., Ld., who were customers of the defendants, a quantity of machinery for delivery f.o.b. Glasgow to the amount of 64,942*l.*

This contract contained (inter alia) the following terms: (1.) that in the event of any increase taking place in wages or cost of materials or transit rates or any further reduction taking place in working hours, the plaintiffs' prices would be correspondingly increased; and (2.) that the Benjamin Jute Co., Ld., should open in this country a confirmed irrevocable banker's credit to the extent of 70,000*l.*

On February 14, 1920, the defendants wrote to the plaintiffs the following letter:—

"4 *Crosby Square,*
"*London.*

"To MESSRS. URQUHART LINDSAY & Co.,
Dundee.

"DEAR SIRS,

"We beg to advise you that under instructions received from our Calcutta branch we are prepared to pay you the amounts of your bills on B. N. Elias, managing agent, the Benjamin Jute Mills Co., Ld., Calcutta, to the extent of, but not exceeding 70,000*l.* in all (say seventy thousand pounds). The bills are to be accompanied by the following complete documents covering shipments of machinery to Calcutta, are to be drawn payable 30 days after sight, and are to be received by us for payment on or before April 14, 1921:—

"Signed Invoices in duplicate.

"Complete sets of bills of lading made out 'to order' indorsed in blank and marked by the shipping company 'freight paid.'

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"Policies of insurance against marine or war risks.

"This is to be considered a confirmed and irrevocable credit, and the bills should bear a clause to the effect that they are drawn under credit No. 102 dated Calcutta, January 15, 1920.

"Kindly acknowledge receipt.

"Yours faithfully,

"M. HARKNESS,

"*Manager.*"

The plaintiffs thereupon bought raw material and in 1920 began to manufacture the goods. They made two shipments under the contract in February and March, 1921, and tendered to the defendants bills of exchange together with shipping documents, which the defendants duly paid. On February 18, 1921, the defendants wrote to the plaintiffs, in reference to their former letter of February 14, 1920, a further letter advising them that they had heard from Calcutta that should it be necessary for the plaintiffs to include in their invoice for extra cost of labour, this extra amount must be referred to the buyers, before they (the defendants) would be at liberty to pay the same. The defendants then refused to meet the bills of exchange presented by the plaintiffs on the third shipment, and only did so, under protest on May 9, 1921, when the confirmed credit had expired.

The plaintiffs meantime on April 12, 1921, issued a writ in the action, and in their points of claim, dated June 29, 1921, alleged that the defendants' letter of February 18, 1921, was a breach of the contract contained in their letter of February 14, 1920, and that they (plaintiffs) had suffered damage, and lost the profit which they would otherwise have made, and that there was no available market for the goods.

The defendants in their points of defence (July 30, 1921) alleged that it was a term or condition in the contract between the plaintiffs and the Benjamin Jute Mills Co., Ld., that the plaintiffs should not draw bills of exchange for more than shippers' current prices in December, 1919, and in particular

that they should not include in such bills any increased cost over the price in 1919 on which the agreed credit of 70,000*l.* was calculated. They contended that the plaintiffs had acted in breach of this term or condition; and further that the damage (if any) was too remote and was not recoverable.

Neilson K.C. and *C. P. Blackwell* for the plaintiffs.

Stuart Bevan K.C. and *Sir Cassie Holden* for the defendants.

The points taken in argument are sufficiently set out in the judgment of Rowlatt J.

Cur. adv. vult.

Dec. 5. ROWLATT J. read the following judgment: In this case the essential facts are few and simple. The plaintiffs in this country arranged with the Benjamin Jute Mills, Calcutta, to manufacture and ship to them over a series of months a quantity of machinery, at prices mentioned in a pro forma invoice; subject however to a stipulation not infrequently insisted upon by manufacturers at the date when the arrangement was made, that should the cost of labour or wages advance there would be a corresponding advance in the prices to be paid by the buyers. The goods were to be paid for by means of a confirmed irrevocable credit to be opened by the buyers in favour of the plaintiffs with a bank in this country, who were to pay the plaintiffs for each shipment as it took place. In pursuance of this arrangement the defendant bank at the instance of the buyers issued to the plaintiffs a document the terms of which I need not rehearse in detail, it being sufficient to state that the defendants undertook up to a certain amount and within a certain limit of time to pay the plaintiffs, against bills drawn upon the buyers accompanied by corresponding invoices and shipping documents, the amount of such invoices. This credit was by its terms to be irrevocable and the invoices were to be for machinery. There can be no doubt that upon the plaintiffs acting upon the undertaking contained in this letter of credit consideration moved from the plaintiffs, which bound the defendants to the irrevocable character of the arrangement

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between the defendants and the plaintiffs; nor was it contended before me that this had not become the position when the circumstances giving rise to this action took place.

Having received the letter of credit, the plaintiffs proceeded to manufacture the machinery and actually shipped two instalments of it, receiving payment from the defendants under the letter of credit against bills accompanied by invoices and other documents called for by that instrument. Before the third shipment was made the buyers, finding that the plaintiffs were including in their invoices an addition to the prices originally quoted, in respect of an alleged rise in the cost of wages or materials, instructed the defendants only to pay so much of the next invoices as represented the original prices. These instructions (very unfortunately, as I think, from many points of view) the defendants obeyed. The plaintiffs however refused to part with the documents representing their goods unless they received the full amount of the invoices; and upon the defendants maintaining their position cancelled the contract as to further shipments, as upon a repudiation by the buyers, and have brought this action against the defendants, claiming as damages the loss on material thrown on their hands, and loss of profit; in other words, the same damages as they would claim against the buyers on their repudiation of the contract. After the action had been commenced the defendants paid to the plaintiffs the amount of the invoices, the original refusal of which had caused the dispute.

In my view the defendants committed a breach of their contract with the plaintiffs when they refused to pay the amount of the invoices as presented. Mr. Stuart Bevan contended that the letter of credit must be taken to incorporate the contract between the plaintiffs and their buyers; and that according to the true meaning of that contract the amount of any increase claimed in respect of an alleged advance in manufacturing costs was not to be included in any invoice to be presented under the letter of credit, but was to be the subject of subsequent independent adjustment. The answer

to this is that the defendants undertook to pay the amount of invoices for machinery without qualification, the basis of this form of banking facility being that the buyer is taken for the purposes of all questions between himself and his banker or between his banker and the seller to be content to accept the invoices of the seller as correct. It seems to me that so far from the letter of credit being qualified by the contract of sale, the latter must accommodate itself to the letter of credit. The buyer having authorized his banker to undertake to pay the amount of the invoice as presented, it follows that any adjustment must be made by way of refund by the seller, and not by way of retention by the buyer.

There being thus in my view a breach of contract, the question arises what damages the plaintiffs can recover. The point is a new one, and not free from difficulty. It is, of course, elementary that as a general rule the amount of damages for non-payment of money is only the amount of the money itself. If, for instance, the defendants had merely undertaken to pay the price of goods as and when shipped, nothing being said about the undertaking being irrevocable within limits of time and amount, such undertaking would become binding only in respect of each shipment upon its being made, the successive shipments being the separable considerations for the separable undertakings referring to them respectively; and the engagement could be revoked at any time as to future shipments. In such a case the damages in case of a refusal to pay for any shipment made before revocation would be merely the amount owing in respect of the shipment. In the present case, however, the credit was irrevocable; and the effect of that was that the bank really agreed to buy the contemplated series of bills and documents representing the contemplated shipments just as the buyer agreed to take and pay for by this means the goods themselves. Now, if a buyer under a contract of this sort declines to pay for an instalment of the goods, the seller can cancel and claim damages upon the footing of an anticipatory breach of the contract of sale as a whole.

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These damages are not for non-payment of money. It is true that non-payment of money was what the buyer was guilty of; but such non-payment is evidence of a repudiation of the contract to accept and pay for the remainder of the goods; and the damages are in respect of such repudiation. I confess I cannot see why the refusal of the bank to take and pay for the bills with the documents representing the goods is not in the same way a repudiation of their contract to take the bills to be presented in future under the letter of credit; nor, if that is so, why the damages are not the same. Mr. Stuart Bevan argued that the sellers should go on shipping and sue the bank toties quoties. Why should they be put in this position as against the bank any more than as against the seller? What is the difference for this purpose between the obligation to take the goods and pay the invoice, and the obligation to take bills and documents representing the goods and pay the invoice? The whole purpose of the arrangement is that the seller shall have a responsible paymaster in this country to protect him against the very contingency which has occurred and the very damages which he claims.

Mr. Stuart Bevan, however, further argued that the plaintiffs ought to have minimised their damages by tendering bills only for so much of the invoices as in view of the attitude of the buyer the bank would pay, letting their goods and relative documents go against this reduced payment, and drawing other bills for the balance. These bills they would have to discount without documents, and of course without excluding recourse against themselves; but if the buyers refused them acceptance and the plaintiffs had to pay them they could then, if right in their position, says Mr. Stuart Bevan, still sue the defendants. This is merely to contend that the plaintiffs should have let their documents go against such part of their invoices as the bank would pay, and sue them for the rest. This is not minimising damages but abandoning their right to be paid against documents.

The damages to which the plaintiffs are entitled are the

difference between on the one hand the value of the materials left on their hands and the cost of such as they would have further provided, and, on the other hand, what they would have been entitled to receive for the manufactured machinery from the buyers, the whole being limited to the amount they could in fact have tendered before the expiry of the letter of credit.

A subsidiary question arose whether the plaintiffs are entitled to interest on the money paid after action for the goods that had actually been shipped. I do not see upon what ground I can award this interest.

Judgment for plaintiffs.

Solicitors for plaintiffs: *J. D. Langton & Passmore.*

Solicitors for defendants: *Coward & Hawkesley, Sons & Chance.*

F. P. F.

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Landlord and Tenant—"Dwelling house"—House partly used as Boarding House—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2 (*ii.*); *s.* 13.

Sect. 12, sub-s. 2 (ii.), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides that "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes."

A flat, the standard rent of which was 42*l.*, was let by the plaintiff to the defendant in 1919 at a rent of 109*l.* 4*s.* The defendant used the flat partly for taking in boarders, but she reserved and used certain rooms for her own residence. Subsequently the defendant refused to pay rent at the rate of 109*l.* 4*s.*, and on being sued she alleged that she was not liable for rent at that rate, which was in excess of the standard rent, and she counterclaimed the excess she had paid. The deputy county court judge held that the premises were used for business purposes, and that as s. 13 of the Act which protected business premises was no longer in force, they were not within the protection of the Act; he accordingly gave judgment for the plaintiff:—

Held, that the premises came within s. 12, sub-s. 2 (ii.), of the Act;

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that the defendant was not liable to pay rent in excess of the standard rent; and that she was entitled to recover the excess she had actually paid over the standard rent.

Tompkins v. *Rogers* [1921] 2 K. B. 94 observed upon.

APPEAL from Croydon County Court.

In June, 1917, the owner of premises in Anerley, which had been let as a separate dwelling house, converted them into two separate flats or maisonettes, and let the upper flat at a rent of 42*l.* per annum. In November, 1919, the plaintiff purchased the premises, and by a lease dated January 10, 1920, she demised the upper flat to the defendant for a term of five years from December 25, 1919, at a yearly rent of 109*l.* 4*s.* The defendant used the flat partly for taking in boarders, but she reserved and used certain rooms for her own residence. Subsequently disputes arose between the plaintiff and the defendant, and the latter, having taken advice, refused to pay any longer the rent at the rate of 109*l.* 4*s.*, alleging that it was in excess of the standard rent. On being sued in this action by the plaintiff for rent, she counterclaimed the amount of the excess she said she had overpaid.

The deputy county court judge, who was referred to *Tompkins* v. *Rogers* (1), held that the premises, being used for business purposes, were not within the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as s. 13 thereof was no longer in force; he therefore gave judgment for the plaintiff.

The defendant appealed.

E. T. Dale for the defendant. The fact that the flat was in part used by the defendant for taking in boarders does not make it the less a dwelling house entitled to the protection of the Rent Restriction Act, 1920: see s. 12, sub-s. 2 (ii.), and *Epsom Grand Stand Association* v. *Clarke*. (2) *Tompkins* v. *Rogers* (1) does not affect this case. That was a decision on s. 13 of the Act which in that case gave greater protection to the tenant; it did not decide that premises in fact let

(1) [1921] 2 K. B. 94. (2) [1919] W. N. 170; 35 Times L. R. 525.

as a dwelling house might not be within s. 12, sub-s. 2 (ii.). The flat here in question being a dwelling house within the Act, it follows that the defendant is not liable for the rent at the rate claimed and is entitled to recover the excess she has paid.

[He also referred to *Waller* v. *Thomas* (1) and *Sinclair* v. *Powell*. (2)]

S. C. N. Goodman for the plaintiff. The flat was let to the defendant that she might take in boarders; it was therefore let for business purposes and is not a "dwelling house" entitled to the protection of the Act. *Tompkins* v. *Rogers* (3) was not cited as binding the deputy county court judge to find as he did, and his decision was not founded on that decision.

SHEARMAN J. stated the facts and continued: The question is whether the flat in question, which was a separate dwelling house actually let at 109*l.* 4*s.*, whereas the standard rent was 42*l.*, is entitled to the protection of the Rent Restriction Act, 1920. When the flat was let to the defendant the provision contained in s. 12, sub-s. 2 (ii.), of that Act was not in force, but *Epsom Grand Stand Association* v. *Clarke* (4) had previously decided that where premises in one letting were partly let for trading purposes, but there was a substantial letting and user of them for residential purposes, they constituted a dwelling house within the Rent Restriction Act, 1915, and I think that s. 12, sub-s. 2 (ii.), of the present Act was inserted to give statutory confirmation to that decision. It follows, therefore, that the letting of this flat was of a dwelling house, and as it was let at a rent in excess of the standard rent the defendant was entitled to refuse to pay the excess and to recover the excess she had actually paid.

The deputy county court judge was referred to *Tompkins* v. *Rogers*. (3) That case presents great difficulties. The headnote states the decision quite accurately; it says: "Sect. 13, sub-s. 1, of the Increase of Rent and Mortgage Interest

(1) [1921] 1 K. B. 541.
(2) [1921] W. N. 206.
(3) [1921] 2 K. B. 94.
(4) [1919] W. N. 170; 35 Times L. R. 525.

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(Restrictions) Act, 1920, provides that 'this Act shall apply to any premises used for business, trade or professional purposes . . . . as it applies to a dwelling house.' The appellant occupied a dwelling house partly for her own residence and partly for letting rooms as lodgings: *Held*, that the house was 'used for business purposes' within the above section." That is all the judges say in their judgments. They were not, however, referred to *Epsom Grand Stand Association* v. *Clarke* (1) or to s. 12, sub-s. 2 (ii.), of the Act of 1920. In *Tompkins* v. *Rogers* (2) the justices had made an order for possession, holding that the premises were not, within s. 13, used for business purposes, and that reasonable alternative accommodation had been offered by the landlord. Their decision was reversed by the Divisional Court, who held that the premises came within s. 13. But no argument was addressed to the Court that the alternative accommodation offered applied, because the premises were also a dwelling house. Salter J., in his judgment, said: "The premises may be a dwelling house, but if the house is used for business purposes the section applies." The case has been much discussed, and in a recent appeal from Nottingham County Court this Court upheld the decision of the county court judge that premises occupied as were those in *Tompkins* v. *Rogers* (2) constituted a dwelling house. Speaking for myself I think that *Tompkins* v. *Rogers* (2) is no authority for saying that premises partly used for business purposes may not be a dwelling house within, and entitled to the protection of, the Act. The deputy county court judge was therefore wrong in deciding that this flat was not entitled to the protection of the Act. The appeal must be allowed.

SALTER J. I agree, and would add nothing but for the fact that I was a party to the decision of *Tompkins* v. *Rogers*.(2) The Act of 1920 gives great privileges and protection to tenants of dwelling houses, and it expressly provides that the tenant of a dwelling house is not the less entitled to that protection because part of the house is used for business

(1) [1919] W. N. 170; 35 Times L. R. 525. (2) [1921] 2 K. B. 94, 97.

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purposes. The Act by s. 13 further gave privilege and protection, but on a somewhat more restricted scale, to tenants of business premises. It is obvious that premises may be in fact a dwelling house and at the same time be used for business purposes. But if the decision in *Tompkins* v. *Rogers* (1) was that if premises are used for business purposes they cannot be a dwelling house within the Act, I think myself that it cannot be supported.

Appeal allowed.

Solicitor for plaintiff: *F. Gowen, Croydon.*
Solicitors for defendant: *A. E. Eves & Jones.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Nov. 21, 22.

ROLLINGS *v.* THOMPSON.

Employer and Workman—Industrial Disease—Compensation—Certificate of Suspension by certifying Surgeon—Compensation paid as from Date of Certificate—Subsequent Certificate of Disablement fixing earlier Date as happening of Accident—Validity—Compensation as from earlier Date—Remedies, whether alternative—Finality of Certificate as to Nature of Disease—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8, *sub-s.* 1 (*i.*), (*ii.*), (*a*), (*f*).

The applicant, a painter, was formerly in the employ of the respondent. On May 29, 1920, he became ill and consulted his panel doctor, who certified that he was suffering from lead poisoning. On August 12, 1920, the certifying surgeon gave a certificate of suspension under s. 8, sub-s. 1 (ii.), that he had suspended the applicant from his usual employment on account of his having contracted lead poisoning. The respondent appealed against this certificate to the medical referee, but his appeal was dismissed. Compensation was paid to the applicant as from August 12, 1920. On January 20, 1921, the applicant obtained from the same certifying surgeon a certificate of disablement under s. 8, sub-s. 1 (i.), which stated that he was suffering from dermatitis, the result of lead poisoning, and that the disablement commenced on May 29, 1920. An appeal from this certificate was dismissed by the medical referee on February 4, 1921. The respondent refused to pay further compensation as from that date. In April, 1921, the applicant commenced arbitration proceedings, and in his particulars of claim he set

(1) [1921] 2 K. B. 94, 97.

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out both the certificate of suspension and the certificate of disablement. The respondent in his answer alleged that the applicant had not since February 4, 1921, been incapacitated from work as the result of lead poisoning or dermatitis. At the hearing evidence was given on behalf of the respondent by medical witnesses that the applicant was not suffering from lead poisoning or its sequelæ, and, further, that the dermatitis had nothing to do with lead poisoning.

The deputy county court judge found that the applicant was unable to work by reason of lead poisoning from May 29 to August 12, 1920; that he was not incapacitated from work on account of lead poisoning or its sequelæ since February 4, 1921; and that the applicant had not satisfied him that dermatitis had any connection with lead poisoning. He held that the certificate of disablement was invalid, as the applicant, having elected to proceed under s. 8, sub-s. 1 (ii.), could not revert to the procedure under s. 8, sub-s. 1 (i.):—

Held, that the remedies provided by clauses (i.) and (ii.) of sub-s. 1 of s. 8 were not alternative in the sense of being mutually exclusive, and that the applicant, having obtained a certificate of suspension under clause (ii.), was not precluded from subsequently obtaining a certificate of disablement under clause (i.), which fixed the happening of the accident at an earlier date and thereby entitled him to compensation as from that date.

Held, also, that the certificate of disablement having certified that the applicant was suffering from dermatitis, and no evidence having been adduced by the respondent to show that the applicant was not then suffering from the same disease as that certified, the deputy county court judge was bound by the certificate, and was not entitled to find on the evidence before him that the disease was not in fact that which was certified.

Bedford v. *Cowtan & Sons* [1916] 1 K. B. 980 followed on this point.

Held, therefore, that the appeal must be allowed and an award made in favour of the applicant.

APPEAL from an award of the deputy judge of the Kidderminster County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The facts are fully stated in the judgment of the Master of the Rolls and were shortly as follows:—

The applicant, Arthur Edward Rollings, was a painter, and was formerly in the employ of the respondent, Richard Thompson, a builder. On May 29, 1920, he became ill and consulted Dr. Wood, his panel doctor, who gave him an ordinary certificate under the National Insurance Act, 1911, to the effect that he was suffering from lead poisoning. On August 12, 1920, Mr. Evans, the certifying surgeon, gave a certificate of suspension under sub-s. 1 (ii.) of s. 8 of the

Workmen's Compensation Act, 1906, that he had suspended the applicant from his usual employment on account of his having contracted lead poisoning. On August 21, 1920, the respondent appealed against this certificate, but on September 13, 1920, his appeal was dismissed by the medical referee. Compensation was paid to the applicant as from August 12, 1920, without arbitration proceedings having been taken. On January 20, 1921, the applicant obtained from the same certifying surgeon a certificate of disablement under s. 8, sub-s. 1 (i.), of the Act, which stated that he was suffering from dermatitis the result of lead poisoning and that the disablement commenced on May 29, 1920. The respondent appealed against this certificate, but his appeal was dismissed by the medical referee on February 4, 1921. The respondent continued to pay compensation until February 4, 1921, but refused to pay further compensation as from that date. On April 20, 1921, the applicant commenced proceedings for arbitration. In his particulars of claim the applicant stated both the certificate of suspension and the certificate of disablement. The respondent in his answer alleged that the applicant had not since February 4, 1921, been incapacitated from work as the result of lead poisoning or dermatitis.

The hearing of the arbitration proceedings took place before the deputy county court judge on June 7, 1921. On behalf of the respondent evidence was given by medical witnesses that in their opinion the applicant was not suffering from lead poisoning or its sequelæ and further that the dermatitis had nothing to do with lead poisoning.

The deputy county court judge made his award in the following terms: "I find as a fact that the applicant was unable to work by reason of lead poisoning from May 29 to August 12, 1920. I also find as a fact that applicant has not been incapacitated from work on account of lead poisoning or its sequelae since February 4, 1921. The applicant has not satisfied me that dermatitis has any connection with lead poisoning. I hold the second certificate invalid. The applicant having elected to proceed under s. 8 (ii.) cannot revert to procedure under s. 8 (i.)." He

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therefore dismissed the application and granted costs to the respondent.

The applicant appealed on the grounds that the learned deputy judge misdirected himself and was wrong in law (1.) in holding that the certificate of disablement of January 20, 1921, was invalid; (2.) in not considering the question whether or no the applicant was suffering from dermatitis as set out in para. 2 of the schedule annexed to the Third Schedule of the Workmen's Compensation Act, 1906; (3.) in not considering the question whether or no the applicant was unable to work by reason of dermatitis as set out in the said annexed schedule from May 29, 1920, to August 12, 1920; (4.) in not considering the question whether or no the applicant had been incapacitated from work on account of dermatitis as set out in the said annexed schedule since February 4, 1921; (5.) in not making an award in favour of the applicant on the ground that he was suffering from dermatitis as set out in the said annexed schedule on May 29, 1920, and thereafter until the date of the said award—namely, June 7, 1921; (6.) in holding that the applicant had not satisfied him that the dermatitis had any connection with the lead poisoning; and (7.) in holding that the applicant elected to proceed under s. 8, sub-s. 1 (ii.), of the Workmen's Compensation Act, 1906, and/or that the applicant was thereby rendered unable to revert to the procedure under s. 8, sub-s. 1 (i.), thereof.

The appeal was heard on November 21, 22, 1921.

Cave K.C. and *A. R. Churchill* for the applicant. The provisions of clauses (i.) and (ii.) of sub-s. 1 of s. 8 of the Workmen's Compensation Act, 1906 (1), are not inconsistent

(1) Workmen's Compensation Act, 1906, s. 8, sub-s. 1:—

"Where—

(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed; or

(ii.) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of

with one another in the sense of being mutually exclusive. There is therefore nothing to prevent an applicant who has obtained a suspension certificate under the former from subsequently obtaining a disablement certificate under the latter assigning an earlier date to the happening of the accident. The applicant is not here relying on the suspension certificate but on the subsequent disablement certificate, which is, it is submitted, perfectly valid. That being so, the certificate is conclusive of the nature of the disease from which he is suffering. No evidence was adduced by the respondent to show that there had been any change in the disease since the date of the certificate and the learned deputy county court judge had therefore no power to go behind it and to hear the evidence of the medical witnesses: *Bedford* v. *Cowtan & Sons* (1); *Chuter* v. *Ford & Sons.* (2) Dermatitis is a scheduled disease and the deputy county court judge was therefore bound to hold that down to February 4, 1921, the applicant was suffering from dermatitis as a sequelæ of lead poisoning.

Frost v. *Clanway Colliery Co.* (3), on which the respondent may rely, was quite a different case and has no application to the present.

A. R. Thomas (*Shakespeare* with him) for the respondent. The applicant having elected to proceed under clause (i.) of sub-s. 1 of s. 8 cannot subsequently proceed under clause (ii.) of the same sub-section. He is therefore bound by the first certificate. By s. 8, sub-s. 1 (*a*), the suspension or disablement is to be treated as the happening of the accident.

having contracted any such disease; or

(iii.) the death of a workman is caused by any such disease;

and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—

(*a*) The disablement or suspension shall be treated as the happening of the accident. . . . ."

(1) [1916] 1 K. B. 980.

(2) [1915] 2 K. B. 113.

(3) [1920] 1 K. B. 423.

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The certifying surgeon having fixed one date by the suspension certificate as the happening of the accident it would be extremely inconvenient if the applicant could get a subsequent certificate fixing another date as the happening of the same accident. The rights of third parties might be thereby affected. It is submitted that when once the date of the happening of the accident is fixed it cannot subsequently be altered.

As regards the conclusiveness of the certificate, it is submitted that the certificate speaks only up to its date and that there was nothing to prevent the deputy county court judge from inquiring what the applicant was suffering from after January 20, 1921. The certificate is not conclusive that the dermatitis from which the applicant is now suffering is one of the sequelæ of lead poisoning.

Cave K.C. was not called upon to reply.

LORD STERNDALE M.R. I think this appeal should be allowed. The claim is for compensation by a painter who was working for a builder and not in a paint manufactory. He contracted lead poisoning and thereafter dermatitis, and I think the evidence shows that over the whole of the relevant period, from May 29, 1920, until the hearing of the arbitration proceedings, he was suffering continuously from lead poisoning or its sequela dermatitis and that the dermatitis was of the same nature. There was no real difference in the nature of his complaint, and there was no intervening cause operating to change its nature. During a portion of this time he was suffering from active lead poisoning, but at the date of the certificate of disablement he was not suffering from lead poisoning but from dermatitis only. On August 12, 1920, a certificate of suspension was given to him by the certifying surgeon in this form. It is headed "Certificate under s. 8, (1.) (ii.) Workmen's Compensation Act, 1906. Certificate of suspension by certifying or appointed surgeon" and was worded as follows: "I the certifying surgeon for Mr. J. Thompson contractor hereby certify that after personally examining Arthur Edward Rollings, I have on the 12th day of August

in pursuance of the provisions under the Factory and Workshop Act, 1901, suspended the said Arthur Edward Rollings from usual employment on account of his having contracted lead poisoning, being a disease to which the Workmen's Compensation Act applies." The result of this was under s. 8, sub-s. 1 (ii.), according to the way in which the sections of the Act are arranged, to give him compensation, and to fix the date of the suspension as the happening of the accident. He had been suffering from dermatitis before that certificate. He received compensation in virtue of that suspension without taking proceedings. He recovered sufficiently to think of going back to work, but apparently never went. Then he had a relapse, and on January 20, 1921, a certificate was given to him by the same gentleman in these terms: "I as certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district of Kidderminster, hereby certify that having personally examined Arthur Rollings on this 20th day of January, 1921, I am satisfied that he is suffering from dermatitis, result of lead poisoning, being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed, and I certify that the disablement commenced on the 29th day of May, 1920." According to that certificate, the date to be treated as the date of the disablement is May 29, 1921. Of course the certificate of suspension has nothing to do with the date when the disease began, but the disablement certificate has to show that date. It is also to be noted that the disease is differently stated in the two certificates. In the suspension certificate he is stated to be suffering from lead poisoning, in the disablement certificate he is stated to be suffering from dermatitis resulting from lead poisoning. He asked for compensation under the latter certificate, to begin as from May 29, 1920. The deputy county court judge said: "No. You have elected to proceed and claim compensation under the suspension certificate, and you cannot now resort to the disablement certificate." In support of that argument it is contended that the benefits provided by s. 8 are alternative

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Lord Sterndale M.R.

remedies, and that if you adopt one you cannot afterwards adopt the other. It is said that under s. 8 either of the certificates fixes the date of the happening of the accident, and that (if you adopt both alternatives) you may have two different dates for the happening of the same accident. In my view, it is not the same accident. I think one certificate fixes the date of the accident for the suspension, and the other fixes the date of the disability, and as there never was an accident at all (both accidents being purely notional) I cannot see why you should not have two different dates. The section does not, in my opinion, say that each of the remedies given constitutes a cause of claim exclusive of the other. I do not see why a workman after claiming under a suspension certificate should not afterwards claim larger benefits under the disablement certificate. I have some doubt as to whether it was proper to give a suspension certificate at all in this case, but the point was not taken in the Court below, and I will therefore assume that it was a good and valid certificate; but even so I see no reason why it should prevent a workman proceeding under the disablement certificate. Why the applicant put in both certificates in the request for arbitration I do not know, but he did so, and I think it is not a case in which the one certificate excludes the other.

Then there is another point. The deputy county court judge has also found that the applicant was not incapacitated from work on account of lead poisoning or its sequelæ since February 4, 1921, that date being taken as being the date on which the appeal against the disablement certificate was dismissed by the medical referee. The learned deputy county court judge seems to have thought that he was precluded from interfering with the certificate up to that date, but that after that date he could inquire for himself. In that I think he was wrong. He should, in my opinion, have taken the date of the certificate itself, and not the date of the appeal from it. I think he was clearly wrong on the authority of *Bedford* v. *Cowtan & Sons*. (1) There the circumstances

(1) [1916] 1 K. B. 980.

were almost identical with those in the present case. It was there decided that if after the date of the certificate the man is still suffering from the same disease as shown by the certificate, the certificate is conclusive as to the nature of the disease. If it can be shown that he recovered, or that something has occurred to bring about a fresh disease, then the county court judge can review the whole matter, but if it is the same disease, then its nature is concluded by the certificate and the county court judge cannot go behind it.

I therefore think that the appeal should be allowed and an award made in favour of the applicant.

WARRINGTON L.J. I am of the same opinion. In this case the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district on January 20, 1921, certified that the applicant was suffering from dermatitis the result of lead poisoning, being one of the diseases to which the Workmen's Compensation Act, 1906, applied, and was thereby disabled from earning full wages at the work at which he had been employed and that the disablement commenced on May 29, 1920. The particular disease is one of those which under the provisions of the Act is to be presumed to be due to the nature of the employment. The applicant therefore prima facie satisfied the conditions of s. 8, sub-s. 1, for the receipt of compensation. He applied to the county court for compensation on the footing that the disablement had commenced on May 29, 1920. He had already received compensation as from August 12, 1920. Why was he refused compensation as from the earlier date? The reason is that the deputy county court judge was of opinion that the disablement certificate was of no force, inasmuch as prior to its date the certifying surgeon had on August 12, 1920, given a suspension certificate under which compensation had been paid since August 20, 1920. The deputy county court judge came to the conclusion that s. 8 provides for compensation in alternative cases. First, where there has been a suspension certificate, secondly, where there has been a disablement certificate, and thirdly, where the workman has died.

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He held that the two first cases were mutually exclusive of one another—that is, that if a workman received compensation under a suspension certificate he was thereby debarred from afterwards receiving compensation under a disablement certificate. With all respect to the learned deputy county court judge I cannot agree with him on that point. It is true that there is a suspension certificate in one case, and a certificate of disablement in the other, and that both are supposed to indicate the date upon which a notional accident happened; but if an applicant can claim under a disablement certificate on the strength of a notional accident which by the certificate is deemed to have taken place at a certain date, I cannot see why he should be precluded from so claiming because he has received compensation as from a later date under a suspension certificate. I think the provisions of clauses (i.) and (ii.) of sub-s. 1 of s. 8 are not descriptions of alternative remedies, but contain an enumeration of certain facts and circumstances which entitle the workman to receive compensation. In my view there is nothing to prevent a man if he fulfils the conditions of one clause from also fulfilling the conditions of the other. On this point I think therefore that the learned deputy county court judge was wrong in law.

Another point raised before us was that he had refused to give compensation subsequently to February 4, 1921. The workman was certified as suffering from dermatitis as one of the sequelæ of lead poisoning. That certificate was confirmed by the medical referee upon appeal on February 4, 1921, and so far it is conclusive. There is no evidence of any change in the applicant's condition; and apparently he is still suffering from dermatitis. But the learned deputy county court judge seems to have thought that the certificate concluded the matter up to February 4, 1921, but that he was not precluded from saying that the man was not after that date suffering from one of the sequelæ of lead poisoning. I think the learned judge was wrong in so thinking. It seems to me that if he was bound to hold that the man was suffering from this complaint up to February 4, he was bound to hold

that he was still suffering from it. The matter is put beyond doubt by the case of *Bedford* v. *Cowtan & Sons* (1), which is binding upon us. I agree therefore that the appeal must be allowed.

ATKIN L.J. In this case the applicant, a painter, was incapacitated from work by illness on May 29, 1920. He left his work and went into hospital. On August 12, 1920, he was suspended from work by the certifying surgeon. On January 20, 1921, he went to the certifying surgeon appointed under the Factory and Workshop Act, 1901, and obtained from him a certificate that he was suffering from dermatitis the result of lead poisoning and that the date of the disablement was May 29, 1920. On April 20, 1921, he commenced arbitration proceedings against his employer for compensation and set out in his particulars of claim that he had been suspended from work on August 12, 1920, and also set out the certificate of January 20, 1921, in which it was stated that he was suffering from dermatitis. The deputy county court judge has refused the applicant compensation except in respect of the period from August 12, 1920, to February 4, 1921, the date of the confirmation of the disablement certificate. First, he refused compensation from May 29 to August 12, 1920, because he said that the applicant had elected to proceed under s. 8, sub-s. 1 (ii.), of the Workmen's Compensation Act, 1906, and was therefore not entitled to rely on the certificate of disablement. Then, as to the period after the period of disablement, he heard the evidence of the medical witnesses, and then proceeded to exercise his own judgment and concluded that the dermatitis from which the applicant was then suffering was not a sequela of lead poisoning. He thought that the certifying surgeon was wrong, and that the dermatitis had no connection with lead poisoning at all. It appears to me that the deputy county court judge was wrong upon both points. There is no question of election here, and no evidence of it. The operation of the Factory Acts shows that it is the duty of a certifying surgeon

(1) [1916] 1 K. B. 980.

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in a case like this, and on the ground of public health, to suspend a man from work, and that it is not a question of voluntary action at all. Mr. Thomas says that the true view is that the remedies given by s. 8, sub-s. 1 (i.) and (ii.), are alternative rights given to the workman, and that whichever certificate is first obtained is the one to prevail, and he points out that there are in effect two different dates given in the section upon which the workman can rely, and he says that as there are two different dates, therefore it must be taken that the certificate first given fixes the date of the workman's disablement, which for all purposes is a final date. I cannot myself accept that view. In the one case the certificate is given under the Factory Acts, and in the other under the Workmen's Compensation Act. The certificate given under the Factory Acts is given in the interests of public health, and those Acts contain no provision for the maintenance of the workman during suspension, whereas under the Workmen's Compensation Act provision is made for the workman, who is thereby entitled to compensation as from the date of the suspension or disablement, which is to be treated as the happening of the accident. The Act also goes on by implication to provide that when a certificate of disablement is obtained, if the certifying surgeon in fact certifies disablement as having taken place at a date earlier than the date of the suspension then the workman is entitled to compensation as from that earlier date. In my view these are special provisions for the benefit of the workman and I see no reason for treating them as inconsistent with one another, and therefore alternative. On the first point therefore I think that the deputy county court judge was wrong. I am unable to see under what rule the suspension certificate was made, as it is not stated in the certificate. I decide the case on the footing that there was a valid suspension certificate.

The other point is whether the deputy county court judge had a right to enter into and discuss the medical evidence, and then decide that dermatitis is not one of the sequelæ of lead poisoning. In my opinion he was bound by the

certificates. [His Lordship read the certificates and continued :] The first certificate was given on August 12, 1920, and the second on January 20, 1921. The deputy county court judge heard the evidence of the medical witnesses, and came to the conclusion that dermatitis was not a sequela of lead poisoning. It seems to me that that statement is inconsistent with the certificate of the certifying surgeon, and the judge himself admitted that the certificate of January 20, 1921, was binding up to the date upon which it was confirmed. He appears to have thought that after that date he could hold that the disease from which the applicant was suffering was not one of the sequelæ of lead poisoning. I think that is not the true view of the Act. It seems to me that as long as the applicant is suffering from the same disease as that which has been certified as being an industrial disease, the certificate that it is that particular disease is conclusive. That seems to me to have been definitely decided in *Bedford* v. *Cowtan & Sons.* (1) In that case Sargant J. in stating the facts said: "At the hearing the workman, who was a painter in the employ of the appellants, produced a certificate of the certifying surgeon, Dr. Bond, which was dated March 31, 1915, and which certified that the workman was suffering from lead poisoning and its sequelae, that he was thereby disabled from earning full wages at the work at which he had been employed, and that the disablement commenced on February 27, 1915. The workman also proved—and indeed on this point the evidence on both sides was in agreement—that the disease from which he had been suffering, and as to which Dr. Bond had certified, was still continuing and that it had caused and continued to cause total disablement." The employers in that case called medical evidence to show that the disease had throughout been a different disease from lead poisoning—namely, a disease known as Parkinson's disease. Sargant J. however said (2): "Now what the appellants are claiming to do here would in my view involve giving the go-by to the whole of these provisions as to a special medical tribunal, and allow

(1) [1916] 1 K. B. 980, 991. (2) [1916] 1 K. B. 980, 992, 993.

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employers in every case to raise the question of the nature of the disease before the county court judge. It is said, indeed, in this case that this is not so, because the appellants submit to pay compensation as from February 27, 1915, down to some later date, such as June 17, 1915, when their doctors first examined the workman, on the footing that the workman must be deemed to have been suffering from lead poisoning down to that later date. But I can see no logical consistency in this view. No one says that the disease has changed. If the disease was not lead poisoning, and the certificate is not conclusive on the arbitrator, then the workman never had any right to compensation at all as for a statutory injury by accident. If the certificate is conclusive, then the workman is entitled while the disease lasts. The county court judge had in my opinion to decide on the same principles and with regard to the same materials for both periods. I cannot find anything in the statute which gives an interim, and not a final, efficacy to the certificate. If its effect is conclusive, it seems to me conclusive as from the first. If it raises only a prima facie presumption, then, when that presumption is displaced, it must be displaced as from the first."

I think that decides the matter, and puts it in very clear language. It is a decision by which we are bound. I think therefore that the deputy county court judge was wrong upon this second point also, and that the appeal must be allowed.

Solicitor for applicant: *H. M. Gowing, for Harold Mayhew & Co., Birmingham.*

Solicitors for respondent: *Calder Woods & Pethick, for F. E. Metcalfe, Bristol.*

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1921
Oct. 27.

UNDERWOOD LIMITED *v.* BURGH CASTLE BRICK AND CEMENT SYNDICATE.

Sale of Goods—Trade Fixtures—Condensing Engine—Delivery Free on Rail—Passing of Property—Deliverable State—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 18.

By s. 18 of the Sale of Goods Act, 1893, unless a different intention appears . . . .

Rule 1: "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2: "Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof. . . . ."

The owners of a horizontal condensing engine agreed to sell it at a price free on rail in London. It weighed thirty tons and was bolted to and embedded in a flooring of concrete. Before it could be delivered on rail it had to be detached and dismantled. The sellers detached it, but in loading it on a truck they damaged it by accident, so that the buyers refused to accept it.

In an action by the sellers for goods bargained and sold:—

Held, that the property in the engine had not passed to the defendants.

By Bankes, Scrutton and Atkin L.JJ. on the ground that the plaintiffs were bound to do something, which they had not done, for the purpose of putting the engine into a deliverable state.

By Bankes and Atkin L.JJ. on the further ground that the circumstances showed an intention that the property should not pass until the engine was placed in safety on rail in London.

Judgment of Rowlatt J., p. 123, ante, affirmed.

APPEAL from the judgment of Rowlatt J. (1)

The plaintiffs on February 19, 1920, agreed to sell to the defendants a horizontal tandem condensing engine to be delivered free on rail in London. On the above date the engine was on certain business premises in Ferry Street, Millwall, as a trade fixture. It weighed thirty tons and was bolted to a concrete flooring in which it had become embedded by its own weight. Before it could be delivered on rail it had to be separated from the concrete bed and dismantled.

(1) Page 123, ante.

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On April 24, 1920, written instructions were sent to the plaintiffs by the defendants to have the engine sent to Yarmouth. Certain small parts were sent on, which gave rise to no question.

On August 6, 1920, while the main body of the engine was being loaded on a railway truck the bedplate was accidentally broken. The defendants after inspection refused to accept it. The plaintiffs brought an action for 650*l.* the price of goods bargained and sold. The defendants pleaded that the property in the engine had not at the date of the accident passed to them.

Rowlatt J. gave judgment for the defendants.

The plaintiffs appealed.

A. Neilson K.C. and *Doughty* for the appellants.

Holman Gregory K.C. and *Jowitt* for the respondents.

BANKES L.J. The only question is whether the property in this engine had passed to the respondents before the damage was done. The contract of sale was in writing. The subject matter of the sale was a horizontal tandem condensing engine, which was at the date of the contract in place and securely fixed at the works of a firm at Millwall. The appellants agreed to sell it to the respondents at the price of 650*l.* f.o.r. London. The engine weighed thirty tons. It was bolted to a concrete emplacement in which it had become embedded by its own weight, so that it had first to be unfastened, a work of two days, and then to be dismantled, a process which required a further two weeks' work and an expense of some 50*l.*, after which another sum of 50*l.* might be required to place it on rail.

Did the property in that engine pass on the contract of sale ? No general rule can be laid down which will answer the question when the property passes in every contract of sale. In many sales of specific articles to be delivered the property passes on the making of the contract. A man may select and agree to buy a hat and the shopman may agree to deliver it at the buyer's house. There notwithstanding the obligation

to deliver the hat, the property passes at the time of the contract. But that is far from this case. Considering the risk and expense involved in dismantling and moving this engine, I have no hesitation in holding that the proper inference to be drawn is that the property was not to pass until the engine was safely placed on rail in London. In my view an elaborate discussion of the rules in s. 18 of the Sale of Goods Act, 1893, is unnecessary. They only apply where a different intention does not appear, and in this case a different intention does appear, assuming for the moment that this machine was in a deliverable state when it was fixed in its position at Millwall. In *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* (1) Lord Herschell put a hypothetical case in which the facts would lead to the same inference—namely, of an intention different from the effect of s. 18, r. 1. But was this engine in a deliverable state in its position at Millwall? The appellants contended that where a specific article is complete in itself, for example a complete engine or a complete cart—that is to say, where nothing more has to be done to make it an engine or a cart—it is then in a deliverable state within the meaning of s. 18, r. 1, and if the owner agrees to sell it the property passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. I do not accept that test. A "deliverable state" does not depend upon the mere completeness of the subject matter in all its parts. It depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract. Where the vendors have to expend as much trouble and as much money as the appellants had to expend before this engine could be placed on rail, I cannot think that the subject matter can be said to be in a deliverable state. The appeal must be dismissed.

SCRUTTON L.J. I agree. Upon some of the points raised I do not think it necessary to express a final opinion, because I have formed a clear opinion upon one point. I assume that

(1) [1898] A. C. 200, 207.

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Scrutton L.J.

this was a sale of a chattel, and not of a mere right to sever. It was a sale of a specific engine f.o.r. London. At the time of the sale the specific engine was fixed by bolts and embedded by its own weight in concrete. It had first to be detached, which could not be done in less than two days. And then it required a further sum of perhaps 100*l.* and two or three weeks' work before it could be put on rail. The sellers had to detach it and take it to pieces; both the expense and the new work were to be provided by them. It is a well-known rule now embodied in s. 18, r. 2, of the Sale of Goods Act, that "where the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done. . . . ." The appellants contended that if an engine the subject matter of a sale is in its place as an engine it is in a deliverable state, and that it is immaterial that it has to be taken to pieces by the vendor before it can be delivered. I do not agree. I find it impossible to apply the definition in s. 62 of the Sale of Goods Act of a "deliverable state" as "a state in which the buyer is bound to take delivery" of the goods, to this case, where the buyers find an engine so firmly attached that it takes two days before it can be got loose, and in such a state that it cannot be put on rail, where they stipulated to have it, until a further two weeks' work has been done upon it. I decide this case on the ground that the sellers were bound to do something for the purpose of putting this engine in a deliverable state, though I do not dissent from the view of Bankes L.J. that in all the circumstances the property was not intended to pass until the engine was placed on rail.

ATKIN L.J. I am of the same opinion. I think, having regard to the terms and conditions of this sale, the parties to it, the subject matter and the circumstances, that the property was not to pass until the engine was on rail. But if that inference is not to be drawn, and if it is necessary to invoke the rules in s. 18 of the Sale of Goods Act, then r. 1 does not apply, because this engine was not at the time of

the contract in a deliverable state, inasmuch as it was affixed to the freehold and could not be put in a state in which the respondents were bound to accept it until it was detached and taken to pieces; and r. 2 does apply, because the vendors were bound to do something to the engine for the purpose of putting it into a deliverable state—namely, to detach it and take it to pieces in order to put it on rail. It is quite plain that the property was not to pass till these things were done and that the appellants took the risk of delivery on to rail.

Appeal dismissed.

Solicitors for appellants: *Hyman Isaacs, Lewis & Mills.*

Solicitors for respondents: *Smith & Hudson, for Wiltshire Sons & Jordan, Great Yarmouth.*

W. H. G.

POOL, APPELLANT *v.* THE GUARDIAN INVESTMENT TRUST COMPANY, LIMITED, RESPONDENTS.

1921
Nov. 22;
Dec. 7.

Revenue—Income Tax—Assessment—Shareholder in Company—Distribution of Dividend in Form of Shares in another Company—Capital or Income—Liability of Shareholder to Income Tax—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35).

The respondent company held shares in the Union Pacific Railroad Co., an American company, which in 1914 declared out of its accumulated profits an extra dividend upon its common capital stock, this dividend consisting partly of cash and partly of shares of the Baltimore and Ohio Railroad Co., in which company part of its reserves were invested. The respondents duly received their proportion of this dividend in cash and shares, and in July, 1915, sold the shares for 1086*l.* 19*s.* 6*d.*, that amount being credited in their books to capital account. Having been assessed to income tax in respect of the amount realized by the shares, the respondents appealed to the General Commissioners who discharged the assessment, holding that the distribution of the assets in question was a distribution by the Union Pacific Co. of capital and not income:—

Held (reversing the decision of the General Commissioners), that the

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distribution was not of capital but of profits or gains, and consequently that the sum in question was liable to income tax.

Inland Revenue Commissioners v. *Blott* [1921] 2 A. C. 171 distinguished.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London, on an appeal by the respondent company against an assessment to income tax in the sum of 1086*l.* 19*s.* 6*d.* for the year ended April 5, 1915.

The following statement of facts is taken, in substance, from the judgment :—

The Guardian Investment Trust Co., Ld. (hereinafter called "the company"), had by December 10, 1912, purchased, and at all material times held, 200 common shares in the Union Pacific Railroad Co., an American company (hereinafter called " the Union Pacific "), which shares the company had purchased out of its capital funds.

The holders of the common stock in the Union Pacific for many years up to and including 1913 had received a dividend of 10 per cent., while the preferred stock holders were entitled to a non-cumulative dividend of 4 per cent., and to no further share of the profits.

The Union Pacific had by the date in question accumulated a considerable reserve, which they had invested in a way which contravened one of the United States statutes. In the result it exchanged those investments and became the owners of a considerable amount of the common stock of the Baltimore and Ohio Railroad Co., an American company (hereinafter called the Baltimore company).

The company duly received the following notice on January 8, 1914, from the treasurer of the Union Pacific : " Union Pacific Railroad Company. Extra Dividend on Common Stock.

" The Board of Directors has this day declared, out of accumulated surplus profits, an extra dividend upon the common capital stock of this company, payable on April 1, 1914, to the holders of the common capital stock registered as such on the books of the company at 3 o'clock P.M. on

March 2, 1914, consisting of the following amounts upon each share of common capital stock then registered in the names of such stockholders, viz.: First: $3.00 in cash, Second: $12.00 par value, of preferred capital stock of the Baltimore and Ohio Railroad Company, to be represented by warrants or certificates of interest, exchangeable on presentation and demand (when presented in amounts of $100.00 par value, or multiples thereof) for stock certificates of the Baltimore and Ohio Railroad Company representing an equal amount par value of the preferred capital stock of that company, and Third: $22.50 par value of common capital stock of the Baltimore and Ohio Railroad Company to be represented by warrants or certificates of interest, exchangeable upon like conditions as aforesaid, for stock certificates of the Baltimore and Ohio Railroad Company representing an equal amount, par value, of the common capital stock of that company. Cheques for the part of the dividend payable in cash and the warrants to which stockholders are entitled, pursuant to the aforesaid declaration, will be mailed in conformity with dividend mailing instructions on file with the company, unless the undersigned is otherwise instructed. Union Pacific Railroad Company, By Frederick V. S. Crosby, Treasurer, 165, Broadway, New York, N.Y., January 8, 1914."

Para. 11 of the case was as follows: "The aggregate amount of the said 'extra dividend' was $74,020,372 made up as follows: (1.) $21,339,206 par value of preferred stock of the Baltimore and Ohio Railroad Company (2.) $46,012,663 par value of common stock of the Baltimore and Ohio Railroad Company, (3.) $6,668,502 in cash, Total $74,020,372."

Para. 12: "The company duly received their warrant above referred to which was exchanged for the share certificates of 45 Baltimore and Ohio Railway common shares of $100 each and 24 Baltimore and Ohio Railway preference shares of $100 each and for a cheque for the cash portion of the dividend."

Para. 13: "The scheme resulting in the payment and

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transfer to the company of the cash and shares above mentioned is more particularly set out in the following portion of the Union Pacific report for the year ending June 30, 1914: 'Extra Dividend on Common Stock. The Union Pacific having been required by decree of the Supreme Court of the United States, to relinquish its control of the Southern Pacific Company and to dispose of its stock in that company the question more or less discussed for a number of years of distributing by extra dividend, a substantial portion of the surplus, naturally recurred. Conservative regard for the future needs of the Union Pacific seemed to require that the cash proceeds of the sale of the Southern Pacific stock should be conserved. After very thorough consideration, the Board of Directors determined to distribute the stock of the Baltimore and Ohio Railroad Company (a considerable portion of which had been received in exchange for stock of the Southern Pacific Company) by way of extra dividend upon the common stock. The distribution of any large amount would make the maintenance of the regular dividend rate of 10 per cent. on the common stock unwise if not impossible. Therefore, in determining the amount and character of the extra dividend, it was resolved to reduce the regular dividend rate on the common stock to 8 per cent. per annum, and to compensate for this reduction in the regular rate by the extra dividend. Accordingly on January 8, 1914, the Board of Directors declared out of the unappropriated accumulated surplus, an extra dividend payable April 1, 1914, to the holder of each share of common stock, of $12 par value in Baltimore and Ohio Preferred Stock then yielding at 4 per cent. 48c.; $22.50 par value in Baltimore and Ohio Common Stock then yielding at 6 per cent. $1.35, and $3 in cash which say at 6 per cent. per annum would yield 18c. or a total of $2.01 thus equalising the regular dividend.' "

The result of the transaction was described in para. 14 of the case as follows: "At the time of the carrying out of the above transaction the yield of the Baltimore and Ohio stock to be distributed for each $100 of the common stock of

the Union Pacific together with 6 per cent. on the amount paid in cash was $2.01 viz. :—

$.c.		$.c.
" 12.00	(par value) in Baltimore and Ohio Preference Stock then yielding 4 per cent.	0.48
22.50	(par value) in Baltimore and Ohio Common Stock then yielding 6 per cent.	1.35
3.00	in cash which say at 6 per cent. would yield	0.18
$37.50		$2.01

" So that the annual income derivable from this source approximated closely to the reduction in the regular dividend on the Union Pacific common stock, viz., 2 per cent. or $2 per year which the Union Pacific resolved to make. On July 28, 1914, the day prior to the date upon which a committee of the London Stock Exchange ordered the stock to be quoted 'Ex,' the $100 share of the Union Pacific Company's common stock was quoted on the London Stock Exchange at 153½–154½ cum extra dividend warrants, and on July 29, $117–119 'Ex,' a difference $36½–35½, which represents approximately the value of the cash and securities ($33.30) transferred from the accumulated surplus at the time of the declaration of the 'extra dividend.' "

Para. 15 : " The company sold the 45 Baltimore and Ohio common shares on July 21, 1915, for 721*l.* 0*s.* 6*d.*, and the 24 Baltimore and Ohio Preference Shares on July 28, 1915, for 365*l.* 19*s.* making a total in all of cash received : 1086*l.* 19*s.* 6*d.* The proceeds of the said sale 1086*l.* 19*s.* 6*d.* were credited to capital account in the company's books and being assessed to income tax form the subject of the present appeal." (1)

The Crown contended that the distribution in question was a distribution of undivided accumulated profits of the Union Pacific and that what was received by the company in respect of such distribution was assessable as income or profits.

(1) No appeal was brought in respect of the cash portion of the dividend.

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The company contended: "(*a*) That this distribution was a distribution of the source from which the regular dividends of the Union Pacific were derived and that it was intended to be and was a realisation of capital and that in the hands of the company it could not be assessed as income; (*b*) that the Union Pacific had transferred their accumulated surplus to capital account and intended to make a distribution of capital and not income; (*c*) that the Union Pacific shares having been bought by the company out of capital funds and the proceeds of the sale of the shares and cash distributed having been placed to capital account and treated as an investment by the company to replace the depreciation in value of the Union Pacific shares owing to the said distribution the said shares and cash were capital in the hands of the company and not income; (*d*) that the Crown were claiming to tax part of the source from which the taxable income was derived."

The Commissioners, holding that the distribution of the assets in question to the company was a distribution of capital and not income and was not liable to assessment to income tax, discharged the assessment, and the present case was stated at the request of the inspector of taxes for the opinion of the High Court as to whether the determination was correct.

Sir Gordon Hewart A.-G. and *R. P. Hills* for the appellant.

Sir John Simon K.C., *A. M. Latter* and *R. A. Gordon* for the respondents.

Cur. adv. vult.

Dec. 7. SANKEY J. read the following judgment: The question which falls for determination in this case is whether the Guardian Investment Co., Ld., which is registered and carries on business in England, having received in respect of shares it holds in an American company an extra dividend out of the accumulated profits of that company consisting partly of cash and partly of common capital stock of another American company and having sold that stock, is liable to

pay English income tax on the proceeds arising from the sale. [His Lordship stated the facts set out above and continued:] It is hardly necessary to say that the mere fact that money was not distributed as dividend is not decisive of the question, for money or money's worth may both be liable to income tax: see *Tennant* v. *Smith* (1) where Lord Halsbury says: "I do not deny that if substantial things of money value were capable of being turned into money they might for that purpose represent money's worth and be therefore taxable."

The Commissioners were apparently much influenced by the decision of *Inland Revenue Commissioners* v. *Blott* (2), which at the time of their hearing this case had been decided by the Court of Appeal but had not yet reached the House of Lords. (3)

If that case covers the present one my duty would be to follow precedent and not to lay down principles. It therefore is important to see whether the present case is concluded by *Blott's Case* (3) and for that purpose to examine it somewhat closely.

There have been many decisions, chiefly in connection with the winding up of companies, or the interpretation of wills, where the difference between income, capital, and accumulated profits has been discussed and dealt with, and there are undoubtedly some where it has been held that, by reason of the facts, accumulated profits have been transmuted into capital. For example in *In re Bridgewater Navigation Co.* (4); *In re Spanish Prospecting Co.* (5); and *In re Thomas* (6) it was held that accumulated profits had not been impressed with the character of, or become, capital. In *Bouch* v. *Sproule* (7) it was held they had.

This brings me to the judgment in *Blott's Case* (3), which the Commissioners had not the advantage of having before them. The headnote is as follows: "An assessment to super-tax

(1) [1892] A. C. 150, 156.
(2) [1920] 1 K. B. 114; [1920] 2 K. B. 657.
(3) [1921] 2 A. C. 171.
(4) [1891] 2 Ch. 317.
(5) [1911] 1 Ch. 92.
(6) [1916] 2 Ch. 331.
(7) (1887) 12 App. Cas. 385.

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under the Finance (1909–10) Act, 1910, was made upon the respondent for a certain year in respect of an allotment to him of bonus shares in a limited company. In the previous year the company, in exercise of a power in that behalf conferred by its articles, had passed a resolution declaring that out of its undivided profits a bonus should be paid to its shareholders and authorizing in satisfaction of that bonus a distribution among the shareholders of certain of its unissued shares credited as fully paid up, and the respondent's said shares had been allotted to him pursuant to that resolution :— *Held*, by Viscount Haldane, Viscount Finlay and Viscount Cave, Lord Dunedin and Lord Sumner dissenting, that for the purposes of the super-tax the shares so allotted to the respondent could not be treated as part of his 'total income from all sources for the previous year' within the meaning of s. 66, sub-s. 2, of the Act, inasmuch as they were not part of his income but were an addition to his capital in that year." It will be observed first, that the company had large accumulated profits, secondly, that it had a number of unissued shares, and thirdly, that it in fact did not distribute its profits ; it kept and used them.

The following passages from the speech of Lord Finlay are instructive. After setting out the resolutions by which the company carried out the transaction and the articles of association under which they were empowered and purported to act he proceeds (1): "The general scope and effect of these transactions is beyond dispute. There was an increase in the capital of the company by the retention of the amounts available for dividends. Though the number of shares was increased by the issue of the new preference shares to the ordinary shareholders, this did not affect the proportions to which they were entitled in the undertaking and in any profits. All the shareholders received these new preference shares, so that the proportion in which they were to share in any profits remained the same. As the capital was increased it might reasonably be expected that the profits of the company would be increased, and that the shareholders

(1) [1921] 2 A. C. 192.

would benefit in this way, but their relative shares in the undertaking remained the same. The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future. So far as the present was concerned there was no dividend out of the accumulated profits; these were devoted to increasing the capital of the company. The company had power to do what it pleased with any profits which it might make. It might spend the accumulated profits in the improvement of the company's works and buildings and machinery. These improvements might lead to a great accession of business and increase of profits by which every shareholder would benefit, but of course it could not for a moment be contended that such a benefit would render him liable to super-tax in respect of it. The benefit would not be in the nature of income, and super-tax can be levied only on income. It would be so levied on the dividends afterwards received." And again (1): "The effect of this operation was that the amount of the bonus was retained by the company as additional capital, and that the shareholders got the new preference shares." Lord Haldane's speech is to the same effect where he says (2): "I am, therefore, of opinion, both on principle and on authority, that the transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes, and I do not think that, in the circumstances of this case, the respondent received any income or profits at all."

It will be observed that those facts are very different from the facts in the present case. The Union Pacific did not purport to deal with their own unissued shares and they did distribute their profits in the way above described: (*a*) in cash, (*b*) in shares of the Baltimore company; as Lord Finlay says in *Blott's Case* (3): "The case differs toto cælo

(1) [1921] 2 A. C. 194. (2) Ibid. 188.
(3) Ibid. 196.

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from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or of securities." If there has been no release of assets there has been no distribution and there is nothing to tax, neither is there anything to tax if the release is the distribution of capital. *Blott's Case* (1) was so decided because the majority of the members of the House of Lords were of opinion that there had been no release of assets. The company in fact kept the assets in respect of and distributed previously unissued capital. Similarly in *Bouch* v. *Sproule* (2) the company kept the accumulated profits and allotted new shares (partly paid up) in respect thereof. But it was argued on behalf of the respondents that this question whether the distribution was a distribution of capital or income was merely a question of fact and that if there was evidence to support the findings of the Commissioners this Court would not interfere with it: see *American Thread Co.* v. *Joyce.* (3)

It was contended that it was not impossible in point of law for a distribution to be a distribution of capital and that there was evidence upon which the Commissioners could hold as they did. Such evidence was said to be: first, that the effect of the transaction was to reduce the value of Union Pacific shares by $36—that is to say, they fell from $153 to $117 when quoted "ex" on the London Stock Exchange; secondly, that the result of the transaction was this: that whereas the respondents before received 10 per cent. from the Union Pacific, they now received 8 per cent. from the Union Pacific and 2 per cent. from the Baltimore company and that the 2 per cent. represented the dividend from the shares of the Baltimore company; that the shares were the tree and the 2 per cent. the fruit and that you cannot tax both the tree and the fruit, or, in other words, you cannot tax the source from which the 2 per cent. was derived.

This argument proceeded upon some remarks made by Scrutton L.J. in *Blott's Case* (4) in the Court of Appeal. I

(1) [1921] 2 A. C. 171.
(2) 12 App. Cas. 385.
(3) (1913) 6 Tax Cas. 163.
(4) [1920] 2 K. B. 657, 676.

do not think that those remarks were meant to be conclusive of a case like the present, and I will venture to put another illustration. Those who purchase shares on the Stock Exchange do so at some times when they are described as full of dividend and as it appears from this case shares when they become ex dividend may be marked down. Take the normal case of a 100*l.* share standing say at 80, which on payment of 5 per cent. dividend is marked down to 77½ ex dividend. The 2*l.* 10*s.* dividend could not rightly be described as a distribution of capital, nor could the payment of five years' arrears of dividend in cash be rightly so described, although the result of the payment might be and probably would be a reduction in the capital value of the stock when marked ex dividend. Sir John Simon adopted the attitude of Gallio towards his opponents' argument. He said he was not concerned with it. Whether he confessed it I am unable to judge. He certainly avoided it.

I do not think that the Commissioners intended to state this case merely as a question of fact. They set out in the case numerous decisions, and, more than this, it will be observed that the Commissioners in *Blott's Case* (1) held themselves to be bound by the principles laid down in *Bouch* v. *Sproule*. (2) I have therefore come to the conclusion : (1.) that the present case is not governed by *Blott's Case* (3), and (2.) that it is not, and was not meant to be, a decision on the facts, and I propose to address myself to the question with which this judgment started.

In my view the true test as to whether a distribution of shares falls to be taxed depends upon two questions : (1.) Whether there has been a release of assets ; (2.) if so, whether the assets released were capital or income.

As to (1.) : In the present case there has been a release of assets within the meaning of the words as used by the majority of the Law Lords in *Blott's Case*. (3) As to (2.) : I doubt if it is possible, I am sure it is not desirable, to lay down in answer to the second question any general rule for

(1) [1920] 1 K. B. 114, 125. (2) 12 App. Cas. 385.
(3) [1921] 2 A. C. 171.

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future guidance. M. Portalis, one of Napoleon's Commissioners, observed: "We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. The wants of society are so varied that it is impossible for the legislator to provide for every case or every emergency." (1) It would be quite easy to put cases decisively on one side of the line or the other, but it is not part of the duty of a judge, nor indeed is it his right, to decide such cases as against his successors, by anticipation.

The matter appears to be free from authority in England, but it has already been decided in the Supreme Court of the United States where the principles of law to be applied in this respect do not differ, in my view, from our own. In *Peabody* v. *Eisner* (2) it was held that a dividend by a corporation of shares owned by it in another corporation is not a stock dividend and is subject to the tax like an equivalent distribution of money. By a "stock dividend" is meant a dividend paid in the company's own stock which, as the Court pointed out, in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented this interest.

Later on the whole matter was discussed and it was decided in *Eisner* v. *Macomber* (3) that mere growth or increment of value in a capital investment is not income; income is essentially a gain or profit in itself of exchangeable value, proceeding from capital, severed from it and received by the taxpayer for his separate use, benefit and disposal, and that a stock dividend evincing merely a transfer of an accumulated surplus to the capital account of the corporation takes nothing from the property of the corporation and adds nothing to that of the shareholder and a tax on such dividend is a tax on capital increase.

It must be remembered that the Income Tax Act, 1842, purports to grant to Her Majesty duties on profits arising

(1) Quoted in Introduction to Halsbury's Laws of England, vol. i., p. ccxi.

(2) (1918) 247 U. S. 347.

(3) (1920) 252 U. S. 189.

from (inter alia) trades, and Sch. D, first case thereof, provides that the duty to be charged in respect of any trade is to be computed on a sum not less than the full amount of "the profits or gains of such trade." The Act was not intended to tax capital.

The words, "capital," "income" and "assets" may have different legal and popular meanings, but the duty under Sch. D is a duty chargeable on profits or gains and not upon capital.

As Pitney J. points out in giving the judgment of the Supreme Court of the United States (1) the fundamental relation of capital to income has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream to be measured by its flow during a period of time. He cites on the subsequent page various definitions, one of which was that income may be defined as the gain derived from capital, from labour, or from both combined, and points out that the essential matter is that income is not a gain accruing to capital but a gain derived from capital.

Applying the metaphor of a reservoir to *Blott's Case* (2), the facts found therein may be stated as follows: From the reservoir of capital certain proceeds were allowed to flow down the outlet stream, but these proceeds were not allowed to reach the shareholder. The company enlarged the area of the reservoir and put back the proceeds into the enlarged reservoir; in other words, the proceeds in that case never became the profit or gain or income of the shareholder, but were put back into the capital of the company and the unissued shares issued to the shareholder in respect thereof.

In the present case just the opposite has happened. The proceeds have been allowed to flow down the outlet stream, but they have not been put back into capital. They have been allowed to reach the shareholder in the form of a cash payment and a dividend in specie of the shares of another

(1) 252 U. S. 206. (2) [1921] 2 A. C. 171.

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company, or, as Lord Halsbury put it in *Tennant* v. *Smith* (1): there has been a distribution of money and of money's worth. I am far from saying that there can never be a distribution of capital to the shareholders of the company. There might certainly be such a distribution in the case of the voluntary winding up of a company and the division of its capital assets among the shareholders, but in the present case I am entirely unable to say that there was any distribution of capital, as distinguished from profits or gains. I again repeat the words of Lord Finlay in *Blott's Case* (2), where he said that that case differed toto cælo from a case in which a dividend is paid not in money but in money's worth by the delivery say of goods, or of securities. As Pitney J. said in *Eisner* v. *Macomber* (3), the reliance upon the supposed analogy between a dividend of the corporation's own shares and one made by distributing shares owned by it in the stock of another company, calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders while the former does not.

In the present case there has been, as above stated, a distribution of assets, and, for the reasons that I have endeavoured to give, in my view those assets were not capital assets, but were profits or gains and are taxable under the Income Tax Act.

The so-called dividend was severed from the capital, was not added to it and never became part of it, but was received by the company for its separate use, benefit and disposal.

In my view the Commissioners misdirected themselves and came to a decision which was wrong in law and this appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Linklaters & Paines.*

(1) [1892] A. C. 150, 156. (2) [1921] 2 A. C. 171, 196.
(3) 252 U. S. 215.

J. S. H.

Referred to. PAYNE v. RAILWAY EXECUTIVE [1952] 1 K.B. 26

[IN THE COURT OF APPEAL.]

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Nov. 29, 30; Dec. 20.

BAKER *v.* DALGLEISH STEAM SHIPPING COMPANY.

[1920. B. 4035.]

Negligence—Damages—Loss of Life—Pension to Widow of deceased Seaman—Whether Pension to be taken into Account in assessing Damages—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *s.* 2.

In assessing the damages in an action under the Fatal Accidents Act, 1846, the fact that the plaintiff is, in consequence of the death, in receipt of a pension from the Crown ought, as a general rule, to be taken into consideration, notwithstanding that the pension is dependent on the voluntary bounty of the Crown. That rule, however, is subject, in cases in which the pension is received under the Navy Pay and Pensions Order, 1920, to the necessity of also taking into consideration the probability that the Minister of Pensions will, in the exercise of the powers conferred by that Order, reduce the pension by the amount of the damages awarded in the action.

Judgment of Greer J. [1921] 3 K. B. 481 affirmed on other grounds.

APPEAL from the judgment of Greer J.

One Philip Baker was on April 4, 1918, chief petty officer on board the torpedo-boat destroyer H.M.S. *Bittern*, which was sunk as the result of a collision with the defendants' ship *Kenilworth*, whereby the whole crew of the *Bittern*, including Philip Baker, were drowned. The *Kenilworth* was found to be solely to blame, and the defendants did not dispute that the death of Philip Baker was caused by the negligence of their servants. The present action was brought by Lily Baker, the widow of the deceased, under the Fatal Accidents Act, 1846, on behalf of herself and her four children to recover compensation for her husband's death; and it was brought as a test action for the purpose of getting a decision as to whether in assessing the damages the fact that the plaintiff is receiving a pension from the Crown is to be taken into account. At the time of his death Philip Baker was receiving, as such chief petty officer, a salary which, with certain extra payments, amounted to 130*l.* a year. He also received his uniform and keep while at sea, and the bulk of his income was devoted to the maintenance of his wife and family.

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For some time before her husband's death the plaintiff had been in receipt of 22*s.* a week separation allowance for herself and children and 30*s.* allotment of her husband's pay, and an allotment concession of 3*s.* 6*d.*, making in all 2*l.* 15*s.* 6*d.* per week. For six months after his death she continued to receive an allowance from the Admiralty at the same rate of 2*l.* 15*s.* 6*d.* On October 10, 1918, the above allowance having ceased, she was awarded a pension for herself and children of 1*l.* 17*s.* 6*d.*, which pension continued to be paid at that rate down to September 4, 1919.

By the Navy Pay and Pensions Order, 1920, No. 1021 (1), dated June 11. 1920, but expressed to take effect as from September 3, 1919, the rates of naval pensions were largely increased, and from September 4, 1919, the plaintiff received a pension of 3*l.* 2*s.* 10*d.* a week. The action was commenced on October 28, 1920. (2) The defendants in their defence admitted liability but denied that the plaintiff had suffered any damage by the death of Philip Baker, inasmuch as their pecuniary position was better at the date of action brought

(1) By reg. 10 of the Navy Pay and Pensions Order, 1920, it is provided that: (1.) "Pensions to the widows, children, and dependants of deceased seamen or marines, for which provision is made in the following articles, shall not be claimed as a right, but shall be given as a reward of service, and no pension shall be granted or continued to a widow or dependant who, in the opinion of the Minister, is unworthy of a grant from public funds, and it shall be in the power of the Minister to terminate or suspend any pension that may have been granted to such persons, or to provide for its administration under such conditions as he may determine." Then regs. 11 and 12 fix the rates at which pensions may be granted to widows and children of deceased seamen.

By reg. 24 (*b*): "Where a seaman or marine is injured or killed in such circumstances that a pension, allowance, or grant is payable to or in respect of him under these regulations, and where he or his widow, child, or dependant receives compensation from or on behalf of the person alleged to be responsible for the act or omission which caused the injury or death, any such compensation may be taken into consideration in assessing any pension, allowance, or grant which might be awarded to or in respect of the man, and where the compensation is received after assessment it may be taken into consideration and the assessment may be amended or cancelled accordingly."

(2) By agreement between the parties the case was treated as a test action and the appellants undertook not to take the objection that the action was out of time by reason of its not having been commenced within the twelve months limited by the Fatal Accidents Act.

than it was before his death. The widow was called and proved the several weekly sums received by her before and after her husband's death as above stated. No evidence was called on behalf of the defendants. Greer J. held that the fact of the plaintiffs being in receipt of a pension which was dependent on the bounty of the Crown could not be taken into account in assessing the damages and he awarded them 1000*l.*, of which 500*l.* was allotted to the widow, and the residue was distributed among the four children in certain proportions.

The defendants appealed.

Stuart Bevan K.C. and *Balloch* for the appellants. The action under Lord Campbell's Act is based upon the supposition that the plaintiff has suffered pecuniary loss by the death of the deceased person. As Bramwell B. said in *Bradburn* v. *Great Western Ry. Co.* (1): "The damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If, therefore, the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and similarly, whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account." Down to 1908 that rule applied even to money paid under a policy of insurance upon the life of the deceased. By the Fatal Accidents (Damages) Act, 1908, the law was indeed altered as regards money received under such a policy, but in other respects the rule remains as before. Here the plaintiff has lost nothing by the death of her husband, for under the Order in Council of 1920, she is now in receipt of a larger weekly sum than she received during his life. It is true that under reg. 10 of that Order the pension "shall not be claimed as a right," but those words are not to be interpreted literally, for the regulation goes on to provide that a pension shall not be "granted or continued to a widow or

(1) (1874) L. R. 10 Ex. 1, 3.

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dependant who in the opinion of the Minister is unworthy of a grant from public funds." That regulation taken as a whole means that it is only in the event of unworthiness that a widow otherwise qualified is not to receive a pension. But even if the defendants are wrong in that contention, and if the plaintiff was not legally entitled to the pension, there was a strong probability that she would continue to receive it as matter of grace, and the judge ought to have taken that probability into consideration. There are many cases in which the Courts, for the purpose of assessing loss, take into consideration the probability of the continuance of benefits voluntarily conferred. Thus in an action of slander the plaintiff may recover as special damage the loss of the gratuitous hospitality of friends—*Moore* v. *Meagher* (1); *Davies* v. *Solomon* (2)—though there is no right to have that hospitality continued. So, too, for the purpose of assessing the compensation payable to an injured railway porter under the Workmen's Compensation Act, 1906, the probability that he would, if uninjured, have continued to receive "tips" from the passengers is to be considered: *Great Western Ry. Co.* v. *Helps.* (3) The ground of all such cases is that the probability of the voluntary benefit continuing has a value which is capable of estimation. If Greer J. is right in saying that the plaintiff's pension ought not to be taken into account because it is dependent on the Crown's bounty, that is an objection which strikes at the very root of the action. For the whole basis of an action by a seaman's widow under Lord Campbell's Act is the loss of pay, and pay stands on precisely the same footing as a pension. There is no more legal right to the one than to the other: *Leaman* v. *The King.* (4) If the fact of the pension being a voluntary payment is a reason for excluding it from the credit side of the account, the loss of pay ought for the same reason to be excluded from the debit side. When a man enlists in the Navy the promise that his widow in the event of his death shall receive a pension is just as much part of the bargain between him and the Crown

(1) (1807) 1 Taunt. 39.
(2) (1871) L. R. 7 Q. B. 112.
(3) [1918] A. C. 141.
(4) [1920] 3 K. B. 663.

as that he shall receive pay during the period of his service. Here there is every reason to expect that the Crown will continue to pay the plaintiff her pension, and in that event she is entitled to no damages. If the plaintiff relies on the probability of the Crown reducing the pension under reg. 24 (*b*) of the Order in Council of 1920 by the amount of the damages recovered from the defendants, it was for her to give evidence of the Crown having done so in other cases. No such evidence was given.

Ricketts (*Sir Gordon Hewart A.-G.* with him) for the respondent. The plaintiff had no legal right to her pension. The grant or continuance of it is a purely voluntary act on the part of the Crown: *Admiralty Commissioners* v. *S.S. Amerika*. (1) It is clear from the language of reg. 24 (*b*) that the intention was that the wrongdoer should not derive any advantage from the fact of the widow being in possession of a pension, but that the damages recovered from him should, so far as required for that purpose, go in relief of the public purse. The regulation no doubt provides only that the compensation recovered "may be taken into consideration" in assessing the pension, but it must be assumed that the Minister would not expend any public money in paying a pension to the widow until her remedies against the wrongdoer have been exhausted. But even if there is no presumption that the Minister would pay the widow a smaller pension because of her right of action against the defendants, the onus of showing what the practice has been in that respect lies on the defendants. The plaintiff has only to prove the loss of pay. It is for the defendants to prove anything that goes in reduction of that loss.

Cur. adv. vult.

Dec. 20. The following written judgments were delivered :—

BANKES L.J. This appeal raises a short point of considerable importance with reference to claims for compensation under Lord Campbell's Act. The respondent's husband was a chief petty officer in His Majesty's Navy.

(1) [1917] A. C. 38.

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He was one of the crew of H.M.S. *Bittern*, which was sunk on April 4, 1918, as a result of a collision with the appellants' vessel the *Kenilworth*. The respondent's husband was drowned. The appellants did not dispute that the collision, and the death of the respondent's husband, were due to the negligence of those in charge of the *Kenilworth*. The respondent brought this action claiming compensation under Lord Campbell's Act for herself and for her children. The action was tried before Greer J. who fixed the amount of compensation at 1000*l*., and divided that sum between the various claimants. Under the Statutory Rules and Orders applicable to pay and pensions in the Navy the respondent and her children became eligible for pensions. From an agreed statement put in at the trial it appeared that from September 3, 1919, the respondent had been in receipt, by way of weekly payments for herself and her children, either from the Admiralty, or from the Ministry of Pensions, of sums in excess of anything she had received from her husband during his lifetime. Under these circumstances it was contended for the appellants that the plaintiffs were not entitled to any compensation. This contention raised the question how far, if at all, the pension which had been granted to the respondent and her children could be taken into consideration. Greer J. refused to take it into consideration at all. In this Court it was contended that the learned judge's view was wrong, and that the appellants were entitled to have the fact that the respondent and her children had become eligible for pension taken into account in assessing the compensation. There is no longer any doubt as to the rule to be adopted in the endeavour to arrive at the compensation to which an applicant is entitled under the provisions of Lord Campbell's Act. It is not necessary to refer to the older cases. In the *Taff Vale Ry. Co.* v. *Jenkins* (1), Lord Atkinson states the rule thus: "I think it has been well established by authority that all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues." Lord Haldane says:

(1) [1913] A. C. 1, 6, 7.

"As regards the judgment in the Court below I have already indicated that in my view the real question is that which Willes J. defines in one of the cases quoted to us: *Dalton* v. *South Eastern Ry. Co.* (1): 'Aye or No, was there a reasonable expectation of pecuniary advantage?'" It is quite clear that it is not only legal rights to a pecuniary benefit which are to be taken into consideration. In the case just referred to the expectation was that a daughter who was growing up might give some of her earnings to her parents. In the *Great Western Ry. Co.* v. *Helps* (2), a case under the Workmen's Compensation Act, the expectation was that a porter, had he lived, would have continued to receive tips. In the very recent case of *Barnett* v. *Cohen* (3), McCardie J., after reviewing all the authorities, draws the line between what may and what may not be taken into account by saying that in an action under Lord Campbell's Act it is not sufficient for the plaintiff to prove that he has lost by the death of the deceased "a mere speculative possibility of benefit"; in order to succeed it is necessary for him to show that he has lost "a reasonable probability of pecuniary advantage." In the present case no question arises as to what the respondent's position could have been had her husband continued to live. The question is how far, if at all, it is admissible to take into account the fact that owing to her husband's death, during his term of service in the Navy, the respondent and her children have received and are likely to continue to receive payments from the Ministry of Pensions by way of pension. There is no question that benefits to which a relative becomes legally entitled owing to the death of the person whose death is said to have been wrongfully caused are matters to be taken into consideration in assessing compensation under Lord Campbell's Act. As Greer J. points out in his judgment, it required an Act of Parliament, 8 Edw. 7, c. 7, to take contracts of life insurance out of the category of matters which had to be taken into account in assessing compensation under this Act. In

(1) (1858) 4 C. B. (N. S.) 296.
(2) [1918] A. C. 141.
(3) [1921] 2 K. B. 461, 471.

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Pym v. *Great Northern Ry. Co.* (1) the benefit which a wife and children took under a settlement upon the death of the husband were taken into account in reduction of the compensation payable to them in consequence of the death of the husband. I cannot myself see why, when assessing compensation under Lord Campbell's Act, any distinction should be drawn between an assessment of what is a reasonable expectation of benefit had the deceased person lived, and what is the reasonable expectation of benefit in consequence of the deceased person's death. Both must be taken into consideration in arriving at the real loss. Both may legitimately, in my opinion, be arrived at by the same process. This result appears to me to be quite in accordance with Lord Watson's view in *Grand Trunk Ry. Co. of Canada* v. *Jennings* (2), where, after discussing whether, in that particular case, the fact that the widow of the deceased man became entitled on his death to certain policy monies should be taken into account, he said this: "Their Lordships are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence. It appears to their Lordships that money provisions made by a husband, for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased." In the present case it appears that had the respondent's husband lived, he could, in a short time, have become eligible for a pension under the same Rules and Orders as those under which the respondent became eligible for a pension upon his death. The reasonable expectation of benefit from the husband's pension would certainly have to be taken into account. So, equally, I think must the widow and children's pensions be taken into

(1) (1863) 4 B. & S. 396. (2) (1888) 13 App. Cas. 800, 804.

account. Mr. Bevan, for the appellants, contended that upon the construction of clause 10 of the Statutory Rules and Orders, 1920, No. 1021, the right of the respondent and her children to a continuance of their pensions was legally enforceable when once it had been granted to them. The clause is not well drafted, but I think that it does give an absolute discretion to the Minister either to grant, or to continue, any pension. The fact that the continuance of the pensions is in the discretion of the Minister does not, in my opinion, exclude them from consideration. The reasonable expectation of their continuance must, I think, be taken into account. This expectation is widely different, in my opinion, from the expectation of receiving benefit from voluntary subscriptions of workmen to which Greer J. refers, and I cannot agree with the learned judge's view that the probability of the pensions being continued, either in whole, or in part, is to be excluded from consideration. This conclusion however does not dispose of this appeal, because the effect of clause 24 (*b*) of the Rules and Orders has yet to be considered. No evidence was given in the Court below, or tendered in this Court, as to any practice prevailing in the Ministry of Pensions in reference to this clause. It is obviously inserted in order to make it plain that the discretion of the Minister over pensions included this power of taking into account any compensation received by the pensioner. The learned judge in the Court below did not express any opinion as to what effect this clause had on his mind, as having regard to the view he took it was not necessary for him to do so. This Court has power to draw inferences of fact upon the evidence before it, and as the appellants have chosen to leave the case without any evidence as to the practice of the Ministry of Pensions, the conclusion I draw is that in a case like the present where the pensions place the recipients in so favourable a position compared with what it was during the deceased man's lifetime, the Minister, as the custodian of public money, would certainly reduce the pensions of the respondent and her children by what he considered to be the equivalent of the compensation

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awarded by Greer J. Whether, when such a reduction is made, the respondent's position would be as good as it was during the deceased man's lifetime, or, if worse, how much worse, is a question upon which the appellants should have given evidence had they desired to contest the claim on this ground. They have not done so, and I do not think that this Court should grant a new trial to enable the appellants to frame an entirely new case. For these reasons I think that the judgment appealed from must stand, and the appeal must be dismissed. My decision is based upon the special facts of this case, and except upon the point whether the pensions granted to the widows and children and dependants of the rest of the crew of the *Bittern* who lost their lives in the collision are to be taken into account, the decision does not govern their cases.

SCRUTTON L.J. The appellants' ship, *Kenilworth*, collided with and sunk solely by the negligence of their servants H.M.S. *Bittern*, and unfortunately a number of those on board the *Bittern* were drowned. Their relatives and dependants claimed from the appellants under Lord Campbell's Act damages for the injury resulting to them from the death, and were met by the plea that as the Admiralty paid to the widow or children a pension or allowance because of the death, in ascertaining the injury resulting from the death this must be credited against any loss of payments they might have received from the deceased had he survived. Greer J. has decided that such pensions are not to be taken into account, and the owners of the ship to blame appeal. The facts as to the particular claimant are that for part of the time after the death of her husband on April 4, 1918, namely, from September 3, 1919, she has undoubtedly received more in Admiralty pension and allowance than she would have received from her husband had he been alive, but that such pension or allowance is entirely in the discretion of the Admiralty and not paid under any legal obligation. Further, under reg. 24 (*b*) of the Statutory Rules and Orders, 1920, No. 1021, the assessment of pension may depend on the

amount of compensation received from the wrongdoer, and if the compensation is received after the assessment of pension, the assessment may be revised or cancelled. This Rule does not expressly provide for the contingency that the amount of compensation may be lessened by the probability of receipt of pension from the Admiralty in consequence of the death. But it would be a very unfortunate thing if, the widow's compensation being reduced by the probability of receipt of pension from the Admiralty, the pension was then reduced by the Admiralty because compensation ought to have been obtained from the wrongdoer. If the widow has no legal claim to a pension, the wrongdoer, not the taxpayer would seem to be the proper person to compensate her. Anyhow, the defendants gave no evidence as to the probable or customary action of the Admiralty and could hardly complain if the tribunal assessing compensation attached more importance to the certain loss of allotment and separation allowance than to the voluntary and possible pension from the Admiralty. I do not propose to go through the numerous decisions by which the rights of a claimant under Lord Campbell's Act have been gradually elucidated. They will be found collected in the sixth chapter of Book 1 of Beven on Negligence. They may be summarised in this way. The claim is a new right given by Lord Campbell's Act on new principles, not the transfer of any existing right of the dead man. The claimant is entitled to damages proportioned to the injury resulting to her from the death, and that injury must be pecuniary injury. She is not entitled to money compensation for mental suffering resulting from the death or for loss of the deceased's society. She is entitled to claim on the one hand any pecuniary benefit which it is reasonably probable she would have received if the deceased had remained alive: per Erle C.J. in *Pym* v. *Great Northern Ry. Co.* (1) It is not necessary that she should have a legal right to have received that benefit from the deceased or should have actually received any such benefit before the death: *Taff Vale Ry. Co.* v. *Jenkins.* (2) It is enough that she had a reasonable

(1) 4 B. & S. 396.

(2) [1913] A. C. 1.

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expectation of pecuniary advantage in the future had the deceased survived, which pecuniary advantage may be a voluntary contribution from the deceased. On the other hand, as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is clear if she receives such advantage as of legal right. Thus a sum received by the claimant under an accident insurance policy must have been deducted until the passing of the statute of 1908; in the case of a sum received under a life policy the premiums the deceased would have had to pay if he lived must have been taken into account in assessing his probable income, though the sum paid under the policy need not be deducted: *Grand Trunk Ry. Co. of Canada* v. *Jennings.* (1) And where the claimant received in consequence of the death under a settlement (*Pym* v. *Great Northern Ry. Co.* (2)) or under a partnership agreement, pecuniary benefit from the death, such benefit must be taken into account. In my view the same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death. Less weight will be given to voluntary contributions than to those made under legal obligation, just because they are voluntary. Still less weight will be given to voluntary contributions in instalments, because they are obviously terminable; and still less weight if the contributor announces he will reduce his contribution by the amount of compensation obtained from a wrongdoer who causes the death. Greer J. was therefore in my view wrong in excluding as a matter of law from his consideration the voluntary contributions of the Admiralty in consequence of the death; but would have had to take into account the extreme probability of the Admiralty not continuing a pension

(1) 13 App. Cas. 800. (2) 4 B. & S. 396.

if compensation could be obtained from the wrongdoer. For it is difficult to believe that a public department would put upon the taxpayer a burden which should be discharged by the wrongdoer whose act caused the death. The appellants who should have supplied the evidence gave no evidence of any practice of the Admiralty not to consider compensation from the wrongdoer in assessing the pension.

Taking the facts of the case into consideration, in my view the judge, properly directing himself and considering the probabilities of loss or gain, should have given at least as large a sum as he did give. The judgment below, as to amount, should therefore stand, but the principle of assessment which we have laid down will be available for those who have to assess compensation in other cases resulting from the collision. With this direction as to principle, the appeal should in my opinion be dismissed.

YOUNGER L.J. The important question of principle raised by this appeal is whether in assessing the compensation payable to the different plaintiffs under Lord Campbell's Act, in respect of the death of William Baker, a chief petty officer in the Navy, the husband of the first plaintiff, and the father of the others, Greer J. was justified in excluding entirely from consideration, as he did, the separation allowance continued by the Admiralty to his widow for six months after the death of her husband, and the payments already made, and in future to be anticipated in respect of a pension for herself, and her children awarded under statutory Rules and Orders referred to by the learned judge in his judgment. The conclusion reached by Greer J. as to the general effect of these Rules absolved him, in the view he took of the result, from examining them in detail. The view of their meaning, however, presented by the appellants makes such an examination necessary before the result can, from their angle, be made practical in this case. It will accordingly be convenient at the outset to endeavour to ascertain with some approach to precision the position of the plaintiffs in relation to pension, an inquiry all the more necessary

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because their position in at least one very important respect was not, as I read the relevant Rules, accurately stated by either side during the argument before us. At the present moment the first plaintiff, whom I shall refer to as the widow, is in receipt of an Admiralty pension of 3*l.* 2*s.* 10*d.* a week, made up of 1*l.* 13*s.* 4*d.* for herself, and 1*l.* 9*s.* 6*d.* in respect of her children, the four infant plaintiffs, 10*s.*, 7*s.* 6*d.*, 6*s.*, and 6*s.* respectively. These payments have been made since September 3, 1919, under No. 1021 of the Statutory Rules and Orders, 1920—to which I shall refer as the regulations of 1920. From October 10, 1918—six months after the accident, the separation allowance having been paid in the interval—up to September 3, 1919, the pension paid had been 1*l.* 17*s.* 6*d.* a week only : 17*s.* 6*d.* for the widow ; 6*s.* 8*d.*, 5*s.*, 4*s.* 2*d.*, and 4*s.* 2*d.*, for the children. These payments were made under No. 62 of the Statutory Rules and Orders, 1919, to which I shall refer as the regulations of 1919. These regulations of 1919 were superseded by the regulations of 1920 with effect as is there stated from September 3, 1919. By these regulations of 1920 the Minister is empowered " to make or revise grants under previous Orders in respect of any claims which may have arisen between the outbreak of war and the aforesaid 3rd day of September, 1919. Provided always, that if more favourable to the seaman or marine, the pension, allowance, or gratuity payable under existing regulations shall be granted, and no grant to a seaman or marine, or to the family or dependants of a seaman or marine, shall be reassessed to his or their disadvantage." Now, in the regulations of 1920 there is a clause 24 (*b*) which has no counterpart in the regulations of 1919, but the operation of which the appellants have here recognized might possibly modify their position. And as the death of Baker took place on April 10, 1918, and the action to recover damages under Lord Campbell's Act must be commenced within twelve months after the fatal accident occasioning them, the question was raised, by the appellants, before us, whether the claims of Baker's widow and children to which regard must be had in these proceedings, were not claims under the

regulations of 1919 rather than under those of 1920. The question is not, I think, so important in this case as it might be in others, and, as at the hearing before us it seemed here to be. That for a reason which has perhaps already emerged in the facts just stated. Strictly, however, the answer to it, I think, must be that the regulations of 1919, and not those of 1920, are in the present case the properly relevant regulations to be considered. The result, however, is that the relevant pension to be treated as receivable is not, as was assumed by the appellants, 3*l.* 2*s.* 10*d.* a week, but is 1*l.* 17*s.* 6*d.*, such being in substance the only payment even claimable under the regulations of 1919. It follows that if for any purpose of this case the receipt of 3*l.* 2*s.* 10*d.* is relied on by the appellants, as that sum is being paid under the regulations of 1920, and under them only, the appellants are at once relegated to these regulations to ascertain the terms on which the payment is being made, and for that purpose they must have regard to all the provisions of those regulations, including, of course, r. 24 (*b*), to which reference has already been made. Accordingly in the present case the question whether the regulations of 1919 or those of 1920 are the regulations in point is practically academic; for, assuming now, as I shall hereafter hope to show, that r. 24 (*b*) must, under the 1920 regulations in this case be taken to bring about on receipt of compensation a corresponding reduction in pension, the position of the plaintiffs is that they are not under these regulations liable to suffer any such deduction below 1*l.* 17*s.* 6*d.* for any reason not also operative under the regulations of 1919. Their established position under these last regulations is not, as I have already quoted, to be prejudiced by the regulations of 1920. In other words the relevant figure of prospective future receipt to be taken into account in this case is a weekly receipt of approximately 1*l.* 17*s.* 6*d.* and no more, whichever set of regulations be regarded, because that figure r. 24 (*b*) of the regulations of 1920 is powerless to reduce in view of the established position of the plaintiffs with reference to it under the regulations of 1919. Accordingly, as the only

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question of difference is whether reg. 24 (*b*) is operative to effect any reduction at all in the weekly payments otherwise receivable, in order that in its place I may deal with the effect of that rule I shall, in what immediately follows, refer primarily to the regulations of 1920, the regulations under which the payments to the plaintiffs are now being actually made. The appellants cannot in the circumstances object to this course which is otherwise convenient, and the plaintiffs have not suggested any desire to have their rights against the appellants determined otherwise than in view of the 1920 regulations, which they have no desire to abandon.

What then is the position of the plaintiffs under these regulations? Greer J. has held, and his decision applies also on this head to the regulations of 1919, for, in this respect there is no material variation between the two, that on the true construction of the regulations the payments already received, and now being received by the plaintiff, as pensions, are in law voluntary payments only, dependent on the bounty of the Crown. I agree with him. Such is, I think, the effect of r. 10 (1.) of the regulations of 1920 with its counterpart in r. 10 (1.) of the regulations of 1919. The rule expressly lays it down that the pensions for which, by the regulations, provision is made, shall not be claimed as of right, and although these words may strictly only apply to pensions before they are granted, the last words of the rule which empowers the Minister to terminate or suspend any pension that may have been granted to such persons produce the same result with respect to pensions after they are granted. It was argued that these last words do not relate to all pensions granted, but only to a pension dealt with by the immediately preceding clause to a widow or dependant who "in the opinion of the Minister is unworthy of a grant from public funds." But in my opinion, on consideration of the rule, as a whole, this cannot be its effect. The words do not, I think, as a matter of good sense, apply to such last mentioned pensions, because the provisions with regard to them is imperative. They shall not be granted or continued at all. So soon as the Minister has arrived at

the conclusion which prevents the grant or continuance of such a pension, there is no pension either to be terminated or suspended. Further, upon construction it seems to me more natural to attribute the expression "such persons" to the plural words "widows, children and dependants" at the commencement of the rule, than to the singular, "widow or dependant" in its middle clause. Nor, I think, can the words "may have been granted," although the word "grant" is, it is true, only previously used with reference to a pension referred to in the middle clause, displace the conclusion resulting from the other considerations to which I have referred. It follows, therefore, as I have said, that in my view these pensions are voluntary pensions dependent on the bounty of the Crown. Further, in my opinion, Reg. 24(*b*) of the Order of 1920, which expressly empowers the Minister to take into consideration any compensation which may be paid by the defendants in this case to the intent that the pension already granted and then being paid "may be amended or cancelled accordingly," is in these regulations a most materially important rule. Its purpose, to my mind, is to provide that a pensioner, who has been fortunate enough to recover his compensation from the person responsible for the injury giving rise to the pension, must not in effect expect to receive compensation in the form of a pension twice over, and to my mind it must be assumed that, in other than special circumstances, it will be the duty of the Minister to exercise the power by the rule conferred upon him. If it is in any case, under Lord Campbell's Act, to be supposed that he will not so act, the burden is, I think, upon the defendant to prove it. No such proof is forthcoming here, and the consequence, I think, is that it must now be assumed that irrespective of the receipt of any compensation monies, the plaintiff here can look for the continuance of no greater sum than 1*l.* 17*s.* 6*d.* a week, the sum awarded under the regulations of 1919, with a possible increase for the younger children as they grow older. On the other hand, and this is in favour of the appellants, the result also is that it must be taken, as against the plaintiffs, that their prospective items of

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receipt cannot, by virtue of that rule alone, be reduced below that sum. This conclusion at once disposes of the appellant's main contention, indeed the only contention raised either by their defence or their notice of appeal—namely, that no compensation at all is in the circumstances payable by them to the plaintiffs. Having regard to the conditions, restrictions and limitations as to time attached to the payment even of the full sum of 3*l.* 2*s.* 10*d.* it was not, at the close of the arguments, seriously contended by Mr. Balloch that the appeal could altogether succeed, even on the footing that the larger weekly payment was to be the figure of estimated receipt. It would not, I think, even be suggested by the appellants that if that figure cannot be taken to exceed the smaller sum of 1*l.* 17*s.* 6*d.* there is not a very substantial amount left to be provided by them in the name of compensation for the plaintiffs.

The question however still remains whether either in respect of Admiralty payments already made to the plaintiffs since the accident or in respect of any estimated item of future receipt in the name of pension the appellants can claim any credit at all. Greer J. has held that they can claim none, either in respect of past or of estimated future payments, and that for the reason that all these payments have been and will be purely voluntary, and that they are to be entirely disregarded accordingly. Disregarding them entirely he has assessed the compensation at the amount claimed by the plaintiffs, 1,000*l.* : 500*l.* for the widow and 500*l.* for the children. On this two questions arise : (1.) Has he reached this conclusion on proper principles ? (2.) If not, can his conclusion be supported by the application to the facts of the right principles ? The answer to the first of these questions is, I think, in the negative, and to the second in the affirmative. It is convenient I should state that at once. As to the first question it appears to me that the principles upon which compensation under Lord Campbell's Act is assessed are now well settled by authority. It will, I think, for the purposes of this case suffice if I refer to two leading statements on the subject. "The right to damages," says

Erle C.J. in *Pym* v. *Great Northern Ry. Co* (1), "is based on the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased." "The right conferred by statute," says Lord Watson in *Grand Trunk Ry. of Canada* v. *Jennings* (2), "to recover damages . . . . is restricted to the actual pecuniary loss sustained by each individual entitled to sue. In some circumstances, that principle admits of easy application; but in others, the extent of loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture. . . . . When the means of the deceased have been exclusively derived from his own exertions, whether physical or intellectual, it becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work, and remuneration; and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation." So far these observations of Lord Watson have reference to the second of the two questions left for discussion, and I shall recur to them when I deal with that question. What follows has a special bearing upon the first question with which I am now immediately concerned. "Their Lordships," continued Lord Watson, "are of opinion that all circumstances which, though insufficient to exclude a statutory claim, may be legitimately pleaded in diminution of it, ought to be submitted to the jury, whose special function it is to assess damage, with such observations from the presiding judge as may be suggested by the facts in evidence." Now it seems to me that the payments now in question are exactly of the character there referred to by Lord Watson. The death of Baker, due to causes for which the appellants are responsible, was and will be both the causa causans and the causa sine qua non of their payment. I take these words from the judgment of Lord Sumner in *Admiralty Commissioners* v. *S.S. Amerika* (3) and apply them, as I think properly—he

(1) 4 B. & S. 396, 408. (2) 13 App. Cas. 800, 803, 804.
(3) [1917] A. C. 38, 61.

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was not there doing so—to the recipients. The fact that they are voluntary does not affect them in this respect. Further, the fact that they are voluntary is, so far as I can see, they being what they are, no reason for entirely disregarding them. That they may be withdrawn may be a reason for discounting their continuance, although, when the traditions of this country in relation to service pensions are remembered, it may be, I think, assumed that the fact that these payments are voluntary will, apart from any question of supervening personal disqualification, have practically no influence at all upon the question whether or not they will be continued. It is not too much to say that if the State ever reaches the point of deciding to discontinue service pensions it will have reached a point at which it would not hesitate even to repudiate binding obligations. Moreover their voluntary character cannot affect the value to the plaintiffs of those payments already received. Yet Greer J. has disregarded them all, past as well as future. The learned judge has given his reason. He has treated these payments as being the substantial equivalent of the sums frequently subscribed by workmen for the relief of the widow and family of a fellow workman killed by accident. In the normal case I would agree with him in thinking that such voluntary gifts would not be taken into account in estimating the compensation payable by a defendant wrongdoer under Lord Campbell's Act. But my reason for so agreeing with him would be that while the fatal accident to the deceased was in these cases the causa sine qua non of the subscription, it was the occasion but not the causa causans of its payment. I conceive that normally in such cases the amount of the subscription is largely personal to the beneficiaries, and is materially affected by their merit in the eyes of the subscribers or the reverse. Such considerations have no place in the pension payment, and if a case were to occur where such subscriptions as I have referred to were shown to be motived solely on the death of the deceased and were handed over for his widow and children solely because of their relationship to him and irrespective entirely of any personal qualification or merit or otherwise

of their own, I should be of opinion that these payments too, like the pension payment must be brought into account against the defendants' liability. And the reason is that, as Lord Watson says, the right to recover damages is restricted to the actual pecuniary loss sustained by each individual entitled to sue. If that same accident and death has produced from some other quarter a sum which would not otherwise have been received, the recoverable pecuniary loss is pro tanto reduced, and with it the wrongdoer's liability to that extent. It is to my mind a most striking fact that the direction to exclude from the calculation policy moneys payable on the death of the deceased had to be given by statute. In my judgment therefore Admiralty payments already made to the plaintiffs must be brought into account. As to future payments they also must be estimated as to their amount even it may be as a matter of conjecture, they being, of course, severely discounted for the following combination of reasons: (*a*) because they are voluntary and are under actual risk of withdrawal on personal grounds, (*b*) because so far as the widow is concerned her pension actually ceases if she becomes unworthy, (*c*) because so far as the children are concerned the payments will normally cease in each case at sixteen.

I now come to the second question. The learned judge has adopted a wrong principle of calculation, as I respectfully think. Can his conclusion be justified by the application to the facts of the case of the right principles? And, in my opinion, as I have said, it can. The facts of the case are all before us. So far as they have been adduced in evidence they are not in dispute. We are in as good a position to deal with them as was the learned judge. And first I would point out that the learned judge in assessing the compensation at 1000*l.* has not enumerated the items on what I may call the debit side of the account against the defendants. One thousand pounds was the amount claimed by the plaintiffs. There is nothing to show that the learned judge would not have awarded a sum substantially in excess of that amount had a larger sum been claimed. In any case I have arrived at the

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conclusion that after making the fullest allowance in respect of pension money and separation allowance received, or to be received by the plaintiffs, 1000*l.* divided, as the learned judge has done, by no means exceeds the expectation of pecuniary advantage they each had from the continuance of the life of the deceased. A man of thirty-nine years of age only, with a long career of meritorious service in the Navy, who had reached a rank that evidenced his efficiency and integrity, was entitled, if he chose, within a year to retire from the service on a pension for life of 82*l.* 18*s.* per annum. During his service in the Navy he had, as his widow said, given her all he had, and I cannot doubt that he was a man who on retirement from the service with such a record had the expectation in civil life of earning for himself and his family remuneration which, with his pension, would have opened to his wife a prospect of a sum, after deducting all the credits to which I have referred, which would not have been less than 500*l.*, and to his children not less than the 100*l.*, 120*l.*, 140*l.*, and 140*l.* respectively awarded them by the learned judge. The sums awarded are, in my judgment, amply justified by the evidence in the case, and I think they ought to stand. No fault can be found with the conclusions of the learned judge. His judgment is, as I see it, only open to criticism in respect of the principles upon which these conclusions are based.

The appeal accordingly should, I think, be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Parker, Garrett & Co.*
Solicitor for the respondent: *Treasury Solicitor.*

J. F. C.

LECK, APPELLANT *v.* EPSOM RURAL DISTRICT COUNCIL, RESPONDENTS.

1922
Jan. 11.

Public Health—Cesspools—Cleansing—Obligation of Local Authority—"Reasonable excuse"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 42, 43, 44.

The respondents, the local authority, after having for a considerable time cleansed the cesspools in their district whenever requested so to do by the occupiers of houses, decided that for the future, in view of the expense and the frequency with which emptying of cesspools had to be performed, they would only do this work once every three months, but that if the occupier of any house desired his cesspool to be emptied more frequently they would do so if he bore the cost. The respondents having been required by the appellant, the occupier of a house in the district, to empty his cesspool free of cost before the expiration of three months since it was last emptied, and they having failed to comply with his requirement, the appellant took proceedings against them under s. 43 of the Public Health Act, 1875, in respect of their failure. The justices dismissed the complaint, finding that the respondents' decision to cleanse the cesspools in the district every three months was in the circumstances reasonable and sufficient and that the respondents had a "reasonable excuse" within s. 43 for not complying with the appellant's requirement:—

Held, that the justices were entitled to find, on the evidence before them, that the respondents had a "reasonable excuse" within s. 43.

Whether an undertaking by a local authority to empty cesspools at certain intervals is reasonable or not must be judged by reference to the needs of the community as a whole, and not by reference to the case of a particular occupier who may make an excessive use of his cesspool. The local authority's obligation in the matter is a question of degree.

APPEAL from Epsom Justices.

On January 27, 1921, the appellant made a complaint against the respondents that they, being the local authority for the district in which the appellant's house was situate and having undertaken the cleansing of cesspools, failed without reasonable excuse and after notice in writing, to cleanse the cesspool belonging to his house as required by s. 43 of the Public Health Act, 1875.

The following facts were proved or admitted:—

The appellant had owned and occupied since 1914 a house and premises at Burgh Heath within the respondents' district. The house was of the rateable value of 100*l.*, and in 1920 the appellant was assessed and paid for special

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expenses, including sewerage rate, the sum of 8*l.* 19*s.* 2*d.* The house was drained by a watertight cesspool 6 ft. deep, 8 ft. in diameter and holding 4200 gallons. The house and cesspool were built and constructed in 1911 after the plans therefor had been submitted to and approved by the respondents. In that year the respondents had no control over the size of cesspools. On April 1, 1919, the respondents wrote to the appellant stating that the cesspool would be emptied in compliance with his application of March 31 and complaining that his cesspool accommodation was insufficient and that it was hardly reasonable for the respondents to bear the expenditure involved in emptying it so frequently. The provision of a soakaway for bath water only would relieve the cesspool and put an end to the trouble at a cost of about 20*l.* Bylaws of September 12, 1900, clause 9 of which provided that "the occupier of any premises in the district shall once at least in every three months cleanse every cesspool belonging to such premises," were put in together with model bylaws published by the Local Government Board in 1912 one of which provided as follows: "When necessary and at least once in every six months."

During the whole period of the appellant's occupancy of the house up to and including October 15, 1920, the respondents, when requested by the appellant, cleansed the cesspool, although from time to time and in particular by letters of April 1, 1919, and May 7, 1919, they complained of the unreasonable frequency with which he made those requests.

For a considerable time before May 26, 1920, the respondents in fact cleansed cesspools in the district when requested to do so by the occupiers of houses.

By resolution dated April 28, 1920, of the respondents' sanitary committee, subsequently confirmed by resolution dated May 26, 1920, of the respondents, it was resolved that any resolution or resolutions adopting s. 42 of the Public Health Act, 1875, so far as related to the cleansing of cesspools, be rescinded and that any resolution or resolutions imposing any obligations or duty on the council in respect of the cleansing

of cesspools in the district be also rescinded. No notice was given at any material time of this resolution to occupiers of houses in the district or to the appellant except that on August 4, 1920, the respondents' surveyor wrote to the appellant saying that the respondents, owing to the heavy expense incurred in emptying cesspools in the district, had decided that they could only empty cesspools once in every three months, and that if they were asked to empty them oftener the cost of so doing must be paid by the occupier.

On November 25, 1920, his cesspool being full and requiring to be emptied, the appellant by letter dated Thursday, November 25, 1920, requested the respondents to empty the cesspool "one day next week." In reply to that letter the respondents' surveyor on November 29, 1920, wrote to the appellant stating that the cesspool had been emptied on October 15 (as was the fact) and that without instructions from the respondents he was unable to empty the same within three months of that date unless the appellant was prepared to pay 2*l.* 12*s.* the cost of so doing. The appellant on December 6, 1920 (the respondents not having in the meantime emptied or cleansed the cesspool) sent the respondents a cheque for 2*l.* 12*s.* in order that the cleansing might be carried out without delay, the appellant stating in his accompanying letter that the payment was made under compulsion, and protesting against the respondents' action and their right to the said payment. On December 8, 1920, the respondents cleansed the appellant's cesspool.

From and after the expiry of the appellant's notice of November 25, 1920, the respondents continued in default in complying therewith at least three days.

The appellant's cesspool was cleansed by the respondents seven times in 1920 before November 25, 1920, at a cost of 37*l.* 18*s.* for labour alone.

The respondents contended :—

(*a*) That the appellant's letter of November 25, 1920, was not a good notice within s. 43 of the Public Health Act, 1875, as it required them to cleanse the cesspool "one day next

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week." If that was a good notice the respondents would have been liable to penalties if they had failed to cleanse within seven days.

(*b*) That they, the respondents, had not undertaken generally or contracted for the cleansing of all the cesspools in the district within s. 42 of the Public Health Act, 1875, but by virtue of their resolution of May 26, 1920, had rescinded any previous resolution imposing the obligation or duty on them to cleanse cesspools in the district.

(*c*) That the Public Health Act, 1875, did not require a local authority to cleanse a cesspool at unreasonably frequent intervals and that the respondents were entitled to limit the occasions on which they were prepared to undertake the cleansing of cesspools to a reasonable interval of once only every three months, and that therefore the respondents were under no obligation to cleanse the appellant's cesspool before the lapse of three months from October 15, 1920, the date upon which it was last cleansed.

(*d*) That in the alternative if the respondents had no power to limit by their resolution of May 26, 1920, the number of occasions on which they undertook the cleansing of cesspools, the resolution authorizing the said undertaking was ultra vires, and they were under no obligation to cleanse cesspools at the public expense.

(*e*) That in the further alternative the respondents had a reasonable excuse for refusing to cleanse the appellant's cesspool until the lapse of three months from October 15, 1920, for the reason that they had already during 1920 up to October 15, cleansed it seven times at a cost of 37*l.* 18*s.*, and that their undertaking to cleanse it every three months was enough, particularly when for a payment of about 20*l.* the appellant could construct a soakaway for bath water only and so render more frequent cleansing unnecessary.

The appellant contended :—

(*a*) That his notice in his letter dated November 25, 1920, was good.

(*b*) That the respondents by cleansing the cesspools in the district whenever required to do so by the occupiers of houses for a considerable time before May 26, 1920, and by cleansing his cesspool whenever required from 1914 to October 15, 1920, had in law and in fact undertaken the cleansing of all the cesspools in the district within s. 42 of the Public Health Act, 1875.

(*c*) That the respondents were bound when required to do so by the appellant to cause his cesspool to be cleansed whenever it was full and therefore needed cleansing, and having undertaken to do so were precluded by the Public Health Act, 1875, from limiting by resolution or otherwise their obligation in this respect.

(*d*) That the respondents' obligation to cleanse the cesspool when required by him was unaffected by the fact that it might and did require to be cleansed more than four times a year, or by the cost of so doing.

(*e*) That no reasonable excuse had been shown by the respondents for failing to comply with his notice of November 25, 1920, requiring them to cleanse the cesspool.

The justices were of opinion that the appellant's letter of November 25, 1920, was a good notice within s. 43 of the Act, but finding that the respondents' undertaking was to cleanse every three months the cesspools of occupiers of houses in the district, including that of the appellant, they were of opinion that that undertaking was sufficient and that the respondents had a reasonable excuse for not emptying the appellant's cesspool in compliance with his notice of November 25, 1920; they accordingly dismissed the complaint.

The question for the opinion of the Court was whether the justices were right in law.

Macmorran K.C. and *N. L. C. Macaskie* for the appellant. The question turns on the proper view of the obligation cast upon local authorities by ss. 42–44 of the Public Health Act, 1875. (1) The justices have found that the respondents

(1) Public Health Act, 1875, s. 42: "Every local authority may, and

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had a "reasonable excuse" within s. 43 for not complying with the appellant's requirements of November 25, 1920. They were not entitled so to find. The respondents undertook the cleansing of cesspools within their district and cannot limit their obligation as they seek to do.

[LORD TREVETHIN C.J. The case states that bylaws had been made by the respondents casting the obligation of cleansing cesspools upon the occupiers of houses in the district. How were these bylaws got rid of?]

They were superseded by the undertaking of the respondents to do the work themselves: *Stainland, &c., Industrial Corn and Provision Society* v. *Stainland, &c., Urban Council.* (1) An undertaking of this kind can be inferred from the practice of the respondents: *Pegg & Jones* v. *Derby Corporation.* (2) Taking it therefore that there was in fact an undertaking by the respondents to cleanse cesspools they must, under s. 43, do so when required by the occupier of any house in their district, unless, indeed, they can set up a "reasonable excuse." It is not a reasonable excuse to say that cleansing is required too frequently, as the undertaking is to cleanse when necessary. Having undertaken the duty of cleansing cesspools the respondents' purported limitation of their obligation is ultra vires.

Wootten K.C. and *Randolph A. Glen* for the respondents.

when required by order of the Local Government Board shall, themselves undertake or contract for— . . . . The cleansing of . . . . cesspools; either for the whole or any part of their district. . . . ."

Sect. 43: "If a local authority who have themselves undertaken or contracted for . . . . the cleansing of . . . . cesspools fail, without reasonable excuse, after notice in writing from the occupier of any house within their district requiring them to . . . . cleanse any . . . . cesspool belonging to such house . . . . to cause the same to be . . . . cleansed . . . . within seven days, the local authority shall be liable to pay to the occupier of such house a penalty not exceeding five shillings for every day during which such default continues after the expiration of the said period."

Sect. 44: "Where the local authority do not themselves undertake or contract for— . . . . The cleansing of . . . . cesspools belonging to any premises, they may make by-laws imposing the duty of such cleansing . . . . at such intervals as they think fit, on the occupier of any such premises. . . . ."

(1) [1906] 1 K. B. 233.

(2) [1909] 2 K. B. 511.

The justices were entitled to find as they did that the respondents had a "reasonable excuse" for not complying with the appellant's requirement.

[AVORY J. What evidence was there of that?]

One object of the Public Health Act is the efficient cleansing of the whole district. If every occupier in the district were to require his cesspool to be cleansed, say once a week, a wholly unnecessary burden would be cast upon the local authority, a burden which they could not perform except at a prohibitive cost. It was reasonable for the respondents to say that they would cleanse the cesspools once every three months free and if required to do the work oftener, at the cost of the particular occupier who required it. Further, the difficulty in this case could easily be obviated by the appellant providing a soakaway. All these circumstances showed that the respondents had a "reasonable excuse" for not complying with the appellant's notice. It is said for the appellant that there was a general undertaking by the respondents to cleanse cesspools. That is not so. There was only a limited undertaking and if it should be held that that was bad, the respondents are entitled to fall back upon their bylaws. Moreover, the notice given by the appellant was bad for ambiguity.

Macmorran K.C. replied.

LORD TREVETHIN C.J. This case raises an interesting question under ss. 42–44 of the Public Health Act, 1875. [His Lordship stated the facts and continued:] It is said for the appellant that the respondents had undertaken the duty, under s. 42, of cleansing the cesspools in the district, and there is no doubt that they in fact, for a considerable time, cleansed them, although bylaws were in existence which cast this duty upon the occupiers. These bylaws had not been enforced. Having regard to what the respondents considered the excessive user of the appellant's bathrooms with the consequent frequent filling of the cesspool they, on August 4, 1920, communicated with the appellant stating that, owing to the heavy expense incurred in emptying

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cesspools in the district, they had decided that they would only empty them every three months, and that if required to empty them oftener they would only do so at the expense of the occupier of the house having a cesspool. The justices have found that the respondents' limitation of their undertaking in this way was reasonable and sufficient, and that the respondents had a "reasonable excuse" within s. 43 for not complying with the appellant's notice. Mr. Macmorran for the appellant contends that this limitation of the respondents' undertaking is ultra vires. I do not agree. The justices in finding that the respondents had a "reasonable excuse" for not complying with the appellant's request had evidence before them upon which they could so find. The respondents had already emptied nearly 30,000 gallons from this cesspool during the year and they were willing to empty it whenever requested, upon payment. The respondents had, in those circumstances, a "reasonable excuse" for not complying with the appellant's notice. Whether the undertaking to empty cesspools at certain intervals is reasonable must be judged by reference to the needs of the community as a whole, and not to the case of a particular individual who wants an excessive amount of user of his cesspool. If the justices thought, as they did, that, upon the facts before them, an undertaking by the respondents to empty the cesspools in the district every three months was reasonable, they were entitled to come to that conclusion. The appeal must therefore be dismissed.

AVORY J. I agree that the appeal fails. The appellant's complaint was made under s. 43, and to establish it it was necessary to say that the respondents had themselves undertaken the cleansing of cesspools. In the circumstances of this case I think it is open to argument whether the respondents had undertaken the cleansing of cesspools. It is clear that after the passing of the resolution of April 28, 1920, they were not such a local authority, because they then resolved not to undertake the duty, and the result was that thereafter it became the duty of every occupier to cleanse his

cesspool. Then upon August 4, 1920, the respondents' surveyor, with their authority as we must assume, sent out a notice that in the future they would empty cesspools every three months, and if they were requested to do so oftener the cost of doing the work must be paid by occupiers. I quite appreciate Mr. Macmorran's argument that a local authority which undertakes the duty of cleansing cesspools must undertake the whole duty; they have no right to undertake the duty with limitations upon it. I am not satisfied that on August 4, 1920, the respondents, by their notice, were undertaking the duty within the meaning of the statute of cleansing cesspools. It is not necessary however to decide this, because the next question, under s. 43, was for the justices to determine —namely, whether in the circumstances of this particular case they had a "reasonable excuse" for non-compliance with the appellant's request. The justices have found that in the circumstances the respondents had a "reasonable excuse" for not complying; and if there was any evidence upon which they could come to that conclusion this Court cannot interfere. At first I was disposed to think that "reasonable excuse" only applied to some inability on the part of the local authority to carry out the work. That is one possible view, but upon further consideration, having regard to the notice of August 4, to the fact that the appellant might for a small payment get the work done without waiting three months, and to the further fact that the necessity for a frequent cleansing of the cesspool might have been obviated by making a soakaway, I think the justices had evidence upon which they could come to the conclusion that the respondents had a "reasonable excuse" for not complying with the appellant's request.

I give no decision on the point raised by Mr. Wootten as to the validity of the notice of November 25, but as at present advised I am not prepared to assent to his contention that the notice was bad. It is unnecessary to decide the point having regard to the fact that there was evidence justifying the justices' finding that the respondents had a "reasonable excuse."

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McCARDIE J. I agree that the appeal should be dismissed. I will assume that the respondents undertook to do the work within s. 42 of the Act. By the word "undertook" I understand that they either expressly resolved to do the thing mentioned in the section, or in practice so acted as to show that they had resolved to do it. That view is supported by the observations of the Court in *Pegg & Jones* v. *Derby Corporation*. (1) If the respondents undertook to do the work, they undertook it in toto. The scheme of this legislation is that the responsibility for the cleansing of cesspools shall fall upon certain definite persons—the local authority, or the contractor, or, in the case mentioned by s. 44, the occupiers of premises; but wherever the duty falls it falls in its entirety. In my opinion the local authority is not entitled to demand any payment whatsoever for the fulfilment of its statutory obligation, but the obligation as to cleansing is a question of degree; it is always a matter of the reasonable interpretation of the statutory duty. So far as the reasonable fulfilment of the section requires the cleansing of cesspools by the local authority it must do so without payment, but once the measure of statutory duty has been reached, there is nothing to prevent the local authority saying to an occupier that if he desires further privileges he may obtain them by payment. The latter position involves no question of ultra vires and is not inconsistent with the section. Here I think the justices meant, in substance, that a reasonable fulfilment of the statutory obligation by the respondents only required the cleansing of cesspools once in three months, and, that being so, the limit of the statutory duty was reached by them. I think the justices meant to find that there was a "reasonable excuse" within s. 43, because having regard to the limit of reasonable interpretation and the totality of the circumstances it cannot be said that the respondents wrongfully failed to carry out their duty. The matter must be one of degree and must in substance be a question of fact. I will only add that nothing that has been said warrants the view that the complete

(1) [1909] 2 K. B. 511.

fulfilment of their duties under the Act can be disregarded by local authorities.

Subject to these observations, I agree that the appeal fails.

Appeal dismissed.

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Solicitors for appellant: *Spencer, Gibson & Son.*

Solicitors for respondents: *Gard, Lyell & Co., for A. R. Cotton, Epsom.*

J. S. H.

Dictum of ATKIN, L.J., at p. 407, *followed.* MITCHELL *v.* BARNES [1949] 2 All E.R. 719.

Applied. MITCHELL *v.* BARNES [1950] 1 K. B. 448

[IN THE COURT OF APPEAL.]

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Nov. 4, 7; *Dec.* 16.

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Emergency Legislation—Dwelling House—Conversion into Flats—Standard Rent of Flat—Increase of Rent, &c., Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 97), *ss.* 1, 2—*Increase of Rent, &c., Act,* 1919 (9 *Geo.* 5, *c.* 7), *s.* 2—*Increase of Rent, &c., Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 1, 12, *sub-ss.* 1, 2, 3 *and* 9.

The application of the Increase of Rent, &c., Act, 1915, by which the landlords of small dwelling houses were precluded from raising their rents, was originally confined to houses the standard rent of which, in the metropolis, did not exceed 35*l.*, and was not extended to houses the standard rent of which, in the metropolis, did not exceed 70*l.* until the passing of the Increase of Rent, &c., Act, 1919.

By s. 12, sub-s. 3, of the Increase of Rent, &c., Act, 1920: "Where for the purpose of determining the standard rent of any dwelling house" —which term includes a part of a house let as a separate dwelling— "to which this Act applies it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed . . . . of the property in which that dwelling house is comprised, the county court may, on application by either party, make such apportionment as seems just."

A dwelling house in the metropolis, which on August 3, 1914, was let at a rent of 65*l.* a year, was in 1916 converted into three separate self-contained flats, which were let to different tenants and separately rated. In October, 1920, the tenant of one of the flats applied to the county court under s. 12, sub-s. 3, of the Increase of Rent, &c., Act, 1920, for an apportionment of the rent on August 3, 1914, of the undivided dwelling house, with a view to the determination of the standard rent of the flat:—

Held, that s. 12, sub-s. 3, did not apply to the case, and that the standard rent of the flat was the rent at which it was first let.

By Bankes and Atkin L.JJ. upon the ground that by the conversion of the house into self-contained flats the identity of the original house

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was destroyed, and that in view of that fact the date of the conversion was immaterial.

By Scrutton L.J. upon the ground that as at the date of the conversion the house was not within the restriction of the Increase of Rent, &c., Act then in force the landlord was equally unrestricted as to the rent which he was entitled to ask for the flats carved out of it.

Woodward v. *Samuels* (1920) 89 L. J. (K. B.) 689 considered.

Judgment of the Divisional Court affirmed on other grounds.

APPEAL of applicant from the judgment of a Divisional Court (Lush and Sankey JJ.) on appeal from the Brompton County Court. (1)

Miss A. E. Powell was the owner of No. 21 Upper Addison Gardens, Kensington, which on August 3, 1914, was an ordinary undivided dwelling house let at the rent of 65*l.* per annum, the rates, water rates and house duty amounting to 14*l.* 11*s.* in addition. In 1916 the house was converted into three separate and self-contained flats called respectively flats A, B and C, 21 Upper Addison Gardens. Flat C, which was the flat on the top floor, was let for the first time in June, 1917, at a rent of 50*l.* a year inclusive of rates. No. 21 Upper Addison Gardens was assessed as a whole on August 3, 1914, at a value of 65*l.* gross, and 55*l.* rateable. The top flat, No. 21 C, was separately assessed as from July 1, 1917, at 33*l.* gross value, and 27*l.* rateable. On October 7, 1920, the landlord gave notice to Miss Sinclair, who was then the tenant of flat No. 21 C, that it was proposed to increase the rent of the flat by a sum which it was claimed did not exceed the additions for increased rates, etc., permitted by the Act. Thereupon Miss Sinclair made an application to the county court under s. 12, sub-s. 3, of the Increase of Rent, &c., Act, 1920, for the apportionment of the rent on August 3, 1914, of No. 21 Upper Addison Gardens, with a view to the determination of the standard rent of the flat No. 21 C, for the purpose of the Increase of Rent, &c., Act, 1920. (2) The

(1) [1921] W. N. 206.

(2) By s. 1 of the Increase of Rent, &c., Act, 1920: "Where the rent of any dwelling house to which this Act applies . . . . has been since March 25, 1920, or is hereafter increased, then if the increased rent . . . . exceeds by more than the amount permitted under this Act the standard rent . . . . the amount of such excess shall . . . . be irrecoverable from the tenant."

county court judge held on the authority of *Woodward* v. *Samuels* (1) that s. 12, sub-s. 3, applied to the case, and ordered an apportionment to be made. The landlord appealed. The Divisional Court (Lush and Sankey JJ.) held that *Woodward* v. *Samuels* (1) was distinguishable upon the ground that in that case the house, which in 1914 was rented at 45*l*., was converted into flats after the coming into force of the Increase of Rent, &c., Act, 1919, by which the application of the Increase of Rent, &c., Act, 1915, was extended to houses of a rental not exceeding 70*l*., and consequently was within the restriction of that Act at the time of the conversion and that the owner could not escape from that restriction by merely converting the house into flats (2); whereas in the present case the landlord was at the time of the conversion entitled to ask any rent he pleased for the undivided house, and must equally be unrestricted as to the rent which he asked for the flats which were carved out of it. They accordingly held that s. 12, sub-s. 3, did not apply, and allowed the appeal.

The applicant appealed to the Court of Appeal.

Sect. 12, sub-s. 1: "For the purposes of this Act, except where the context otherwise requires: (*a*) The expression 'standard rent' means the rent at which the dwelling house was let on August 3, 1914, or, where the dwelling house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling house which was first let after the said 3rd day of August, the rent at which it was first let."

Sub-s. 2: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed (*a*) in the metropolitan district . . . . 105*l*."

Sub-s. 3: "Where, for the purpose of determining the standard rent or rateable value of any dwelling house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling house is comprised, the county court may, on application by either party, make such apportionment as seems just."

Sub-s. 9: "This Act shall not apply . . . . to any dwelling house which has been since that date"—April 2, 1919—"or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements."

(1) 89 L. J. (K. B.) 689.

(2) In *Woodward* v. *Samuels* the flats into which the house was converted were not self-contained. The alterations which there constituted the conversion, as appears from the report, did not include the provision of a separate water closet for each flat.

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Grant K.C. and *Schultess Young* for the appellant. The decision in *Woodward* v. *Samuels* (1) supports the appellant's contention. That case decided, under the law as it then stood, that wherever a house which had been let as a house on August 3, 1914, had been converted into flats since that date the tenant of one of the flats was entitled, for the purpose of arriving at the standard rent of that flat, to have the rent at which the house was let in August, 1914, apportioned. For otherwise no possible meaning could be given to s. 2, sub-s. 3, of the Increase of Rent, &c., Act of 1915 (now s. 12, sub-s. 3, of the Act of 1920), which provides that the Court may apportion the rent "where it is necessary" to do so, since the only case in which it could be suggested that such a necessity arises is where a house has been divided up into two or more flats. Except in that case there can be nothing to apportion. The landlord in *Woodward* v. *Samuels* (1) contended that upon the conversion the original house ceased to exist and that three new ones—namely, the flats—came into existence. The Court there refused so to hold. They held that the flats were not distinct subjects from the undivided house, and that the standard rent of a flat which came into existence after August 3, 1914, was not the rent at which it was first let but its proportion of the rent at which the undivided house was let in August, 1914. That decision was quite irrespective of the question whether the undivided house was within the Increase of Rent Acts at the time of the conversion or not. No doubt the Court in so deciding were mainly influenced by the consideration that if they decided otherwise it would be possible for any landlord to defeat the whole object of the Act by the simple expedient of reserving one room for himself, in which case he would be at liberty to ask any rent he pleased for the remainder. But the motive which induced the Court so to hold cannot affect the nature of the decision. There is nothing in the Act which can justify the Court in differentiating the present case from *Woodward* v. *Samuels* (1) on the ground that in the one case the house was within the Act at the date of conversion and

(1) 89 L. J. (K. B.) 689.

that in the other it was not. That being the effect of the decision in *Woodward's Case* (1) the Act of 1920 was passed, and that Act by s. 12, sub-s. 9, repealed that decision so far as the conversion of a house into flats since April 2, 1919, was concerned, but as regards houses converted into flats before that date it left the law as it stood. The Legislature must be taken to have passed the Act with full knowledge of *Woodward's Case* (1), and as it re-enacted s. 2, sub-s. 3, of the Act of 1915 in precisely the same terms, it must be regarded as having distinctly affirmed that decision. Except where the undivided house was first let after August 3, 1914, the question of the standard rent must in all cases be referred back to that date. Of this we have an illustration in s. 9 of the present Act, which deals with the limitation of rent of houses let furnished. That section provides that where a house is let furnished at a rent which yields a profit more than 25 per cent. in excess of the normal profit which such a letting might have been expected to yield on August 3, 1914, the excess shall be irrecoverable. And the same principle must be held to apply to unfurnished houses as to furnished houses.

L. S. Fletcher for the respondent. There is no case for any apportionment here. The rent of the undivided house is only to be apportioned where apportionment is necessary, and there is no necessity for apportionment in the present case. By s. 12, sub-s. 2, the Act is to apply to "a part of a house let as a separate dwelling where either the annual amount of the standard rent"—that is, of the house or part as the case may be—"or the rateable value does not exceed in the metropolitan police district 105*l.*" This flat came into existence in 1916 and was first let in 1917 at 50*l.* At that date it was not within the Increase of Rent, &c., Act, but on the passing of the Act of 1919, which extended the application of the Act of 1915 to houses rented up to 70*l.*, it was brought within the Act, and as it was first let after August 3, 1914, the standard rent of the flat was by s. 12, sub-s. 1 (*a*), the rent at which it was first let—namely, 50*l.*

(1) 89 L. J. (K. B.) 689.

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It is unnecessary for the respondent to contend that *Woodward's Case* (1) was wrongly decided, for it is distinguishable upon the ground taken by the Divisional Court in the present case. But if that distinction is unsound, then it is submitted that *Woodward's Case* (1) cannot be supported.

Cur. adv. vult.

Dec. 19. The following written judgments were delivered:—

BANKES L.J. In this appeal from a Divisional Court yet another thorny question as to the true construction of the Rent Restriction Acts is raised. The facts are few and simple. The respondent was the owner of a house in Upper Addison Gardens, the rent of which in August, 1914, was 65*l.* and the rateable value 65*l.* gross and 55*l.* rateable. Both rent and rateable value being substantially above the limit laid down in s. 2, sub-s. 2, of the Act of 1915, the house did not come within the provisions of that Act. In the year 1917 the house was converted into three flats each of which was let at a separate rent, as a separate dwelling, and was assessed separately. One of the flats was let to the appellant at a yearly rent of 50*l.* By a provisional valuation list made in September, 1917, this flat was assessed at 33*l.* gross, 27*l.* rateable. The respondent in October, 1920, gave notice to the appellant of an increase of rent, and the appellant thereupon applied to the county court for an apportionment of rent under s. 12, sub-s. 3, of the Act of 1920 in order that the standard rent of the flat might be determined. The appellant contended that the rent to be apportioned was the rent at which the unaltered and undivided house was let on August 3, 1914. The respondent contended that the sub-section had no application to the facts of the particular case. The county court judge accepted the appellant's contention, but his decision was reversed by the Divisional Court. Apart from authority, and the difficulties which must always arise in cases like the present as to the true inference which should be drawn from the facts, the construction to be placed upon

(1) 89 L. J. (K. B.) 689.

the language of the statute as applicable to this case appears to me to be reasonably clear. A house, or a number of houses, may be so altered that it cannot be said of it or them that it or they can any longer be identified as being the same house or the same houses as before the alteration. In the recent case in this Court of *Phillips* v. *Barnett* (1) where three small and adjoining dwelling houses had been gutted, altered, added to, and converted into a factory, we held that though the outer walls of the three houses to a large extent remained unaltered, and in a sense, therefore, the three original houses could be identified, yet the alterations were such as to render it impossible to say that the converted building had ever been let before its conversion, and that the standard rent of the three original houses could not be applied to the converted building so as to arrive at the standard rent of that building. In a similar way I consider that a single house may be so altered by being converted into flats as to lose its identity, with the result that the standard rent of the original house becomes immaterial when considering what are the standard rents of the flats into which the original house had been converted. The Act of 1920 clearly recognizes not only the possibility, but the desirability, of the conversion of single houses into separate flats. Sect. 12, sub-s. 9, of the Act of 1920 exempts from the operation of the Act any dwelling house which since April 2, 1919, has been, or which at that date was being, bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. The sub-section was presumably introduced into the statute because of the decision in *Woodward* v. *Samuels* (2), which must have been interpreted as a decision having a wider effect than I consider that it really has. April 2, 1919, is the date of the passing of the Rent Restriction Act, 1919. Why that date was introduced into the sub-section it is difficult to see. The sub-section has no application to the present case, as the conversion of the house into flats was made in the year 1917, but in my opinion the sub-section cannot be construed as negativing the possibility of such a reconstruction of a

(1) Ante, p. 222. (2) 89 L. J. (K. B.) 689.

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dwelling house into flats before that date as to render the standard rent of the original house inapplicable in considering what the standard rents of the flats are. This sub-section is important as indicating what is also manifested by the immediately preceding sub-section—namely, that the policy of the Legislature underlying the Rent Restriction Acts was to encourage an increase in the amount of dwelling accommodation as well as to restrict the rents which might be charged for dwelling houses. In the present case the inference which I draw from the facts is that what was done to the house in question in the year 1916 was what the Legislature has now termed "a *bona fide* reconstruction by way of conversion" into flats. I do not think that this inference is different from that drawn by the county court judge. He considered himself bound by the decision of *Woodward* v. *Samuels*. (1) I gather from the report of that case that the Court considered that the work done in turning the original house into flats was not such as to destroy the identity of that house. Sankey J. speaks of the property in which the flats were comprised as the "undivided house." Upon this view of the facts I see no reason to dissent from the decision in that case; but if it decided that no reconstruction of a house into separate flats before April 2, 1919, was permissible under the statute, which would allow of the flats being treated as dwelling houses first let after the conversion of the house into flats, I do not agree with it. The Court, whenever called upon to consider the question, must be astute to see that a landlord is not evading the restriction upon increases of rent imposed by the statute by some mere alteration in the character of the lettings, or by small, and possibly colourable, alterations of the structure, or by a mere sub-dividing of the tenement. Nothing of the kind has, in my opinion, been done in this case, but the landlord has, by a bona fide reconstruction of her house, converted it into several self-contained flats which are capable of being, and have, ever since they were created, been separately let, separately occupied, and separately assessed and rated.

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Upon this view of the facts the application of the statute seems clear, and no case arises for any apportionment of rent under s. 12, sub-s. 3, of the Act of 1920. Each of the flats into which the house was converted had become a separate dwelling within the meaning of the statute. Each had its own standard rent, which by virtue of the provision of the statute was the rent at which it was first let. It was unnecessary, therefore, for the purpose of determining what the standard rent of any one of the flats was to apportion the rent of the property in which that dwelling house was comprised.

For the reasons I have given, I agree with the result at which the Divisional Court arrived, though not with the grounds of their decision, and the appeal must be dismissed with costs.

SCRUTTON L.J. Yet another appeal raises a question of constant occurrence for which the Rent Restriction Acts make no clear provision. This time the question is as to the effect of the Acts when a house is by structural alterations converted into flats. It is the converse of the case we recently decided, in which three houses were by structural alterations converted into one factory. We held in that case that the standard rents in 1914 of the three houses respectively had nothing to do with the standard rent of the new factory, which was the rent at which it was first let after conversion.

The facts in the present case are that in 1916 a house of which the rent (65*l.*, tenant paying rates) and rateable value (65*l.* gross) were not within the then Restriction Act was converted into three flats, of which the flat in question was then let at 50*l.*, landlord paying rates, and rated at 33*l.* gross, 27*l.* net. The effect of this was, in my view, to create a new dwelling house within the 1915 Act, first let after its creation at 50*l.*, which was therefore its standard rent. It would not have been possible at that time, in my opinion, to apply for apportionment of the rent of 65*l.* for the whole house in 1914, for the house as a whole was not within the 1915 Act, and had therefore no limitation on the rent which might be charged for it. The flat was not let, or, indeed, in

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existence, at that date, 1914, and had no rent at that date. The Act of 1920 extended the limits of its operation to houses in London rented or rated at less than 105*l.*, and therefore the house as a whole if unaltered would be within the Act. Each of the three flats into which it had been converted certainly was within the Act. Sect. 1 of the Act of 1920 begins: "Where the rent of any dwelling house to which this Act applies has been since March 25, 1920, increased, or is hereafter increased," certain consequences shall follow. If the rent of this flat, being a separate dwelling house, separately rated, had continued at 50*l.* after the Act, the rent at which it was let before the Act, in my view the Act would not prevent 50*l.* being recovered. The rent would not have been "increased," for I cannot construe the words of s. 1 to mean "is on March 25th, 1920, or after higher than the standard rent." Indeed, if one could get that meaning out of the words, as I have pointed out that the rent of the flat was 50*l.*, the rent at which it was first let, at a time when the whole house was not within the Acts, the rent after March, 1920, would not be higher than the standard rent. Again, in my opinion, apportionment could not be applied for. The standard rent of the original house was not applicable to or apportionable between the three reconstructed flats which had taken the place of the whole house. I note that Astbury J. in *Hollands* v. *Cooper* (1) has in the matter of mortgage interest taken a somewhat different view of s. 1 of the Act of 1920; there are special provisions in the Acts as to mortgage interest which may justify this, but it is not necessary for the present case to consider them, or whether the learned judge was correct in his view of s. 1. I reserve the right to reconsider his decision if it should come before me. The judgment of the Divisional Court seems to have stopped at this point, and decided on the first ground I have stated that the landlord was entitled to continue receiving the rent which she had been receiving, which was not an increase of rent, and for the reasons stated I am of opinion that this was correct. But it appears that on October 7, 1920, a notice

(1) [1921] W. N. 298.

was given increasing the rent from 50*l.* a year to 66*l.* 3*s.* The judgment of the county court judge was given on March 27, 1921, the case having been before the Registrar on February 7, 1921. It does not appear when the proceedings were started, nor does the county court judge mention the notice to increase rent, though such notice is obviously the reason why the proceedings for apportionment were started under s. 12, sub-s. 9, of the Act of 1920. By s. 1 of the Act of 1920, if the rent is increased after March 25, 1920, and the increased rent exceeds by more than the amount permissible under the Act the standard rent, such excess is irrecoverable by the landlord, and can be recovered back by the tenant if paid. The tenant apparently desired to contend that there was such an excess, and for that purpose to get a standard rent, as one member of the comparison, and her view was that the rent of the whole house in 1914 was the standard rent which was to be apportioned under s. 12, sub-s. 3, of the Act. As I have said, this view is, in my opinion, erroneous. The standard rent applicable to this flat, separately rated, was the rent at which it was first let, provided there was at the time no legal objection to its first letting. There was in this case no such legal objection, and in my view the flat had a standard rent of 50*l.*, and there was no need to apportion any rent existing in 1914. If the whole house had been within the 1915 Act a different question would have arisen, similar to the question raised in *Woodward* v. *Samuels* (1), where the house when divided and first let in flats was within the 1919 Act. The whole house here was not within any Rent Restriction Act at the time it was divided, and the Divisional Court on this ground distinguished the present case from *Woodward* v. *Samuels* (1), I think correctly. I desire to reserve the question whether *Woodward* v. *Samuels* (1) was correctly decided till the question arises before us on facts raising it. We have enough trouble in deciding the questions which do arise without looking for additional trouble before it arises; and I quite appreciate that difficult questions may arise as to the sub-letting of

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rooms in a house subject to the Restriction Acts, even though those rooms separately occupied may be separately rateable and rated: see the judgment of Lord Esher in *Allchurch* v. *Hendon Union.*(1) The answer may turn largely on a question of fact, the extent of alteration made in the original house; but I do not decide this now. The applicability of *Woodward* v. *Samuels* to flats created after April 2, 1919, has been destroyed by s. 12, sub-s. 9, of the Act of 1920, and the question reserved may not arise. The appeal on the present facts should be dismissed with costs. I am not deciding whether the proposed increases of rent are justifiable, but only that the standard rent of this flat for that purpose is to be taken at 50*l.*, and not an apportioned part of the rent in 1914.

ATKIN L.J. We are asked to construe an obscure clause in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3. I do not propose to recapitulate the facts. The clause is to be found verbatim in the first Increase of Rent Act, 1915, as s. 2, sub-s. 3. It is legitimate to bear that fact in mind in attempting to construe the clause in the later Act dealing with the same subject-matter. In view of the grounds of the decision of the Divisional Court, I find it advisable to recall the provisions of the principal Acts which preceded the present Increase of Rent Act, as they and the present Act have a common purpose, the protection of the poorer classes against the effects of an unrestricted competition for houses in raising rents, and seek to achieve the purpose by a common method. This can be illustrated from the Act of 1915. The Act only applies to a particular class of dwellings. The class is defined by reference to the amount of rent of houses at a specified time. The specified time is either the day before the war, August 3, 1914, or the first day at which a house was let thereafter; and the rent at the specified time is termed the standard rent. If the house in question is one the standard rent of which did not exceed in the metropolitan area 35*l.*—i.e., 13*s.* 6*d.* a week—

(1) [1891] 2 Q. B. 436, 441.

it falls within the class to which the Act is applicable. It may be noted, in order to determine whether the Act applies, that all houses have a standard rent; it is only where the standard rent does not exceed the amount of the statutory limit that the house falls within the Act. When the house falls within the Act, any increase of rent made since a given period is irrecoverable. In the Act of 1915 the period is the beginning of the war; the Act itself was passed on December 23, 1915, and therefore necessarily has a retrospective effect. We can compare the subsequent Acts in this respect. The Act of 1919 was passed on April 2, 1919, and relates to increases made since December 25, 1918. It raises the corresponding statutory limit to 70*l.*—i.e., 27*s.* a week. The Act of 1920 was passed on July 2, 1920; it relates to increases from March 25, 1920, and raises the statutory limit to 105*l.*—i.e., 40*s.* 6*d.* per week. For simplicity I have omitted any reference to rateable values. When a house comes within the statutory class, the prohibited increase is an increase above—not the rent at which the house was let at the passing of the Act but the standard rent with the authorized statutory additions, if any. In the first Act there were no such additions. An illustration will make clear what I mean: House let on August 3, 1914, at 30*l.*, but in September, 1914, let to a tenant on a three years' agreement at 50*l.* a year, and so held on December 23, 1915. The extra 20*l.* a year is irrecoverable on or after December 23, 1915. House let on August 3, 1914, at 50*l.*, but in January, 1919, let at 70*l.*, the difference between 70*l.* and 50*l.* plus the additions authorized by the Act of 1919 is irrecoverable. If the last house had been let in September, 1918, on, say, a three years' tenancy at 70*l.* a year, I am inclined to think that the landlord would not in receiving rent at the rate of 70*l.* a year in March, 1919, be increasing the rent; but after December 25, 1918, his power of increasing the rent of 70*l.* would be restricted by the statute to 50*l.*, plus the additions authorized by the Act of 1919, which might amount to a sum less than 70*l.* Similar instances may be given in respect of the Act of 1920. In the three Acts "house" includes part

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of a house let as a separate dwelling. Obviously, the relief intended by the Act would be nugatory if it did not include the separate tenements in one house in which so many of the poorer classes live. Where such a separate tenement was let on August 3, 1914, and is let in substantially the same form thereafter, precisely the same considerations apply to it as I have just mentioned. But a more difficult question arises where there is a change in the house as it was let on August 3, 1914, whether it be a whole house or a separate tenement. Assume a house let at 30*l.* on August 3, 1914, and that in January, 1915, the landlord let it out without further alteration in two separate tenements at 13*s.* 6*d.* a week each, 35*l.* each or 70*l.* in all. Could the tenant of each of the tenements in January, 1916, say that the rent had been increased since the war and that the standard rent must be taken to be the apportioned rent of the house let on August 3, 1914; or would the landlord be right in saying that the tenement was first let in January, 1915, and that the standard rent was the rent at that date? Assume that the house had not been divided into two tenements, but that having been let on August 3 at 30*l.* the landlord had locked up one room and let the house less the one room in January, 1915, at 70*l.* Would the standard rent of such a house be the rent in August, 1914, or in January, 1915? The case of *Woodward* v. *Samuels* (1), until explained by the learned judges in this case, one of whom, Sankey J., was a party to the decision, would appear to decide that the standard rent was the rent in August, 1914, as apportioned. The distinction suggested in the present case is that apportionment does not apply, where the division is made at a time when the Act does not apply to the house. That would appear to be an odd distinction in the case of the Act of 1915, for the Act covers all increases of rent made after August 4, 1914, and therefore at a period, August 4, 1914, to December 23, 1915, to which at the time no Act applied. If it applies to an increase of rent in letting the same tenement, why not to an increase of rent by dividing the tenement? But what is the position

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after the Act of 1915 was passed ? Could the landlord after the passing of the Act by shutting up one room of a house let in August, 1914, at less than 35*l.*, or of a tenement of three or four rooms let in August, 1914, at less than 35*l.*, let the house or tenement so altered at any unrestricted rent he chose to demand ? It appears to me that so easy a means of evading the Act was foreseen by the Legislature, and provided for by the apportionment clause, and that *Woodward* v. *Samuels* (1) was rightly decided. If in that case the tenement was not let for the first time in May, 1919, assuming that the house was then converted into flats, it seems to me impossible to say that it would have been let for the first time in November, 1918, if the house had then been converted into flats. The question whether the Rent Restriction Act for the time being applied to the house seems to me, with respect, to be irrelevant to the question when the house was first let. It is relevant to the question whether the rent is being increased. For instance, in the present case, as long as the landlord is content to take the rent as fixed in June, 1917, of 50*l.* a year, inclusive of rates, it seems to me that he is not increasing the rent. If, however, he seeks to increase the rent, and standard rent is an apportioned rent, he can only increase the rent up to the apportioned rent together with the authorized statutory additions.

In the present case, however, I think that there is a grave question whether the apportionment section applies. To apply a rent of August, 1914, you must show that the house or part of the house was let at that date. If it has become something different, you do not show it, as we held in a recent case where three dwelling houses had been structurally altered into one factory. If the part of a house was not let as a separate dwelling in August, 1914, you may show that substantially in the form in which it now is it existed and was let as part of a whole house or a larger tenement in August, 1914, and can get the rent apportioned. But if the part has been substantially altered so that you cannot fairly predicate of it that in its present form it was, as part of a whole, let

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in 1914, I do not think that apportionment is possible. The apportioned values may be entirely misleading, as where by structural alterations the upper bedrooms of a house, ordinarily I suppose the least valuable, have become, when fitted as a separate tenement, of greater value than the lower floors. My own view on the statement of facts in this case is that it was impossible to predicate of the three flats of which that of the applicant is one that they were let in August, 1914, as parts of the whole undivided house. They seem to be quite different from the floors which then together constituted the whole. My difficulty in the case is lest this should be an inference of fact, and lest this is a point not properly taken before the county court judge. On the whole, I think that it is open here for consideration, and that the facts leave only one conclusion open in law. I therefore agree that the appeal should be dismissed, though for different reasons from those given by the Divisional Court.

Appeal dismissed.

Solicitor for the appellant: *H. T. Nicholson.*
Solicitor for the respondent: *Herbert A. Phillips.*

J. F. C.

OAKLEY *v.* MERTHYR TYDFIL CORPORATION.

1921
Oct. 14;
Nov. 2.

Local Government—Street—Private Street Works—Expenses—Provisional Apportionment—Premises liable—Access through "court, passage, or otherwise"—Resolutions of Urban Authority—Sufficiency to charge Premises not fronting on Street—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 10.

In the district of an urban authority which had adopted the Private Street Works Act, 1892, there was a terrace consisting of two blocks of ten houses each numbered respectively 1 to 10 and 11 to 20, which had been taken over by the authority as a public highway, and a street passing from the middle of the terrace between Nos. 10 and 11 therein and at right angles thereto. There was also a lane ten feet wide, which had been made for the convenience of the occupants of the terrace, and which had not been ballasted, metalled, or rolled, passing from the terrace along the side of No. 1 therein, then round behind Nos. 1 to 10 to the said street, then on behind Nos. 11 to 20, and then round along the side of No. 20 back into the terrace. There was a back entrance from the lane to No. 1 in the terrace. The urban authority having passed a resolution to make good the said street:—

Held, that No. 1 in the terrace was not so connected with the said street as to come within the words of s. 10 of the above Act "premises . . . . access to which is obtained from the street through a court, passage, or otherwise," and, consequently, that that house could not be included in a provisional apportionment of the expenses of making good the said street.

Under the Private Street Works Act, 1892, ss. 6 and 10, an urban authority passed a resolution that a certain street should be made good, that their surveyor in accordance with the provisions of the Act should prepare as respected the street (inter alia) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the Act and that in settling the apportionment of the expenses among the owners of the premises "fronting, adjoining, or abutting on the above-mentioned street" regard should be had to certain matters. The surveyor prepared a provisional apportionment of the expenses, which included certain premises which did not front, adjoin, or abut upon the said street, as coming within the words of s. 10 "premises . . . . access to which is obtained from the street through a court, passage, or otherwise" and which would be benefited by the works. The urban authority then passed a second resolution approving of the provisional apportionment:—

Held, that the resolutions were sufficient to authorize a provisional apportionment of the expenses upon premises which came within the above words of s. 10.

CASE stated by the stipendiary magistrate for the county borough of Merthyr Tydfil.

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OAKLEY v. MERTHYR TYDFIL CORPORATION.

The Merthyr Tydfil Corporation (hereinafter called "the respondents") were an urban authority who had duly adopted the Private Street Works Act, 1892, and within whose district was a street called Cross Street, Awelfryn Terrace, Penydarren.

The said terrace consisted of two blocks of ten houses each numbered respectively 1 to 10 and 11 to 20, and Cross Street lay between the gable ends of Nos. 10 and 11 in the said terrace at right angles to the said terrace.

The said houses were built about 1898 and fronted upon the said terrace, which was subsequently taken over by the respondents as a public highway.

There was a lane which passed from the said terrace along the side of No. 1 in the said terrace, then round behind Nos. 1 to 10 to Cross Street, then behind Nos. 11 to 20, and then round along the side of No. 20 back into the said terrace. The lane was ten feet wide and was constructed for the convenience of the tenants of the said terrace. It had not been ballasted, metalled, and rolled. There was a back entrance to No. 1 in the said terrace, and any person taking coal, etc., to that back entrance would have to use the road to be repaired as hereinafter stated.

One Mrs. Jane Oakley (hereinafter referred to as "the appellant") was the owner of No. 1 in the said terrace.

On August 24, 1920, the respondents held a meeting at which they passed the following resolution: "Resolved that the street known as Cross Street which lies between the pine ends of Nos. 10 and 11 Awelfryn Terrace . . . . be levelled, ballasted, metalled, gravelled, and otherwise made good, and that the borough surveyor in accordance with the provisions of the Private Street Works Act, 1892, prepare as respects such street: (*a*) a specification of the work with plans and sections; (*b*) an estimate of the probable expenses of the works; (*c*) a provisional apportionment of the estimated expenses among the persons liable to be charged therewith under the Act. Resolved, further, that the council deem it just and accordingly do order that, in settling the apportionment of the expenses among the several owners of the houses and lands fronting, adjoining or abutting on the

above-mentioned street, regard should be had to the following considerations: (*a*) the amount and value of any work already done by the owners or occupiers of such premises; (*b*) the greater or less degree of benefit to be derived by any premises from such works."

The respondents' surveyor prepared an estimate of the probable expenses of the said works and the provisional apportionment was served on the owners of the houses in the said terrace, including the appellant, requiring each to contribute 2*l.* 1*s.* 6*d.*

On September 28, 1920, the respondents held a meeting at which they passed the following resolution: "Resolved that this council hereby approve of the plans, specification, estimate and provisional apportionment prepared by their surveyor with reference to certain street works required to be executed at Cross Street . . . . in pursuance of the resolution to execute such works passed by us on the 24th day of August, 1920."

On September 29, 1920, a copy of the last resolution was duly published and copies thereof duly served upon the owners of the premises shown as liable to be charged in the provisional apportionment and amongst them was the appellant as the owner of No. 1 in the said terrace, access to which it was alleged by the respondents was obtained from the said street through a "court, passage, or otherwise" within the meaning of s. 10 of the Act of 1892. (1)

(1) The Private Street Works Act, 1892, provides:—

Sect. 6: "(1.) Where any street or part of a street is not . . . . made good . . . . to the satisfaction of the urban authority, the urban authority may from time to time resolve . . . . to . . . . make good . . . . such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street . . . .

"(2.) The surveyor shall prepare, as respects each street or part of a street,—

. . . . . .

(*c*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act.

Such . . . . provisional apportionment shall comprise the particulars prescribed in Part I. of the Schedule to this Act, and shall be submitted to the urban authority, who may by resolution approve the same . . . .

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On October 12, 1920, the appellant served a notice upon the respondents, which stated that she objected to the provisional apportionment served upon her in connection with the street works proposed to be executed in Cross Street on the ground that the premises owned by her did not front, adjoin, or abut on the street in respect of which the expenses were to be incurred; and that she further objected on the grounds given in paras. (*c*), (*d*) and (*e*) of s. 7 of the Act of 1892.

It was admitted by the respondents that the primary reason for making up Cross Street was to give access to certain land and premises which they had acquired with a view to laying out that land for building purposes. The total expense of making up the said street amounted to 78*l.* and was equally apportioned between the respondents and the twenty premises forming the said terrace. The amount apportioned to the appellant was 2*l.* 1*s.* 6*d.*, and she was the only objector.

The said lane had never been taken over by the respondents under the said Act of 1892 or otherwise, but had been open for the use of the public since it was laid out and the houses were built.

On January 25, 1921, an application on behalf of the

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with or without modification or addition as they think fit.

"(3.) The resolution approving the . . . . provisional apportionments shall be published in the manner prescribed in Part II. of the Schedule to this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment . . ."

Sect. 10: "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say,)

(*a*) The greater or less degree of benefit to be derived by any premises from such works;

(*b*) The amount and value of any work already done by the owners or occupiers of any such premises.

They may also, if they think just, include any premises which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly."

respondents, of which due notice had previously been given to the appellant, was heard by the said magistrate, being a Court of summary jurisdiction, to determine the matter of the above-mentioned objections made by the appellant to the said provisional apportionment.

At the hearing of the application the above-mentioned facts were proved or admitted.

It was contended on behalf of the appellant: (*a*) That the resolutions passed by the respondents were insufficient to enable a provisional apportionment to be made on premises which did not front, adjoin, or abut upon the premises which were to be made up; (*b*) that the specification prepared by the borough surveyor did not contain the information required by the said Act of 1892 and Part I. of the Schedule thereto; (*c*) assuming the resolutions to be valid and sufficient the means of access to the premises of the appellant from Cross Street were not through a "court, passage, or otherwise" within the meaning of s. 10 of the said Act.

It was contended on behalf of the respondents that the resolutions were sufficient to enable the borough surveyor to apportion part of the expenses on premises which, though not fronting, adjoining, or abutting, nevertheless obtained access to Cross Street by means of a "court, passage, or otherwise" within the meaning of the said Act of 1892.

The magistrate came to the following conclusions: (*a*) that the resolutions of August 24 and September 28, 1920, were sufficient for the purposes of the said Act of 1892; (*b*) that access was obtained to No. 1 in the said terrace from the street in which the works were to be executed through a passage made for the purpose of giving that access thereto; (*c*) that No. 1 in the said terrace would be benefited by the proposed works. He accordingly made an order against the appellant for payment of 2*l.* 1*s.* 6*d.* and five guineas costs.

The question for the High Court was whether the magistrate upon the above facts came to a correct determination and decision in law. If the Court was of opinion in the affirmative, then the said determination was to stand. If in the negative, then the said provisional apportionment was to be disallowed

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or the Court was requested to give such judgment or to make such order as ought to have been given or made by the magistrate as the said court of summary jurisdiction.

du Parcq for the appellant. The appellant's house ought not to have been included in the provisional apportionment, and the provisional apportionment in so far as it relates to the appellant ought to be set aside.

First, the appellant's house is not so connected with Cross Street that it could properly be included in a provisional apportionment under the Private Street Works Act, 1892, of the expenses of making good that street. In order that premises may be included in a provisional apportionment under s. 10 of the Act they must either be "premises fronting, adjoining, or abutting on the street" to be made good, or "premises . . . . access to which is obtained from the street through a court, passage, or otherwise," within the meaning of that section. It is obvious that the appellant's house is not one fronting, adjoining, or abutting on the street which is being made up. Neither is it a house access to which is obtained from the street through a court, passage, or otherwise. It is not connected with the said street by a "court, passage, or otherwise." The lane which passes along the side of and behind the appellant's house and communicates with the said street does not come within any of these terms. It is clearly not a "court." It was not made as a "passage" between the appellant's house and the said street. It is not a link which "otherwise" connects the appellant's house with the street, for that term must be construed as referring only to things ejusdem generis as a court or passage. Even if the appellant's house in being connected with the said street by the lane is connected with it by a court, passage, or otherwise, it is not a house "access to which is obtained from the street through a court, passage, or otherwise" within the meaning of the section. Premises do not come within these words unless they are premises access to which is obtained from the street through a court or passage or some road in the nature of a court or passage which was made primarily

for the purpose of giving access to the premises: *Newquay Urban Council* v. *Rickeard* (1) and *Chatterton* v. *Glanford Rural Council.* (2) The primary purpose for which this lane was made was not to give access to the appellant's house from the said street, but to enable persons to pass from the said terrace to the back of that house, which they can most easily do by using the part of the lane that runs by the side of the house.

Secondly, the resolutions passed by the respondents were not valid and efficient under the Act of 1892 for the purpose of authorizing a provisional apportionment which would include premises other than those fronting, adjoining, or abutting on the street to be made good. The material sections of the Act in this connection are ss. 6 and 10, which must be read together. Under these sections the first resolution contemplated—namely, the resolution to do the works in the street—authorizes an apportionment of the expenses only on premises fronting, adjoining, or abutting on the street, and not on premises which do not front, adjoin, or abut on the street, but access to which is obtained from the street through a court, lane, or otherwise, unless it expressly mentions these latter premises. If that resolution makes no mention of these latter premises the expenses cannot be apportioned upon them: see Scholefield and Hill on The Paving and Sewering of New and Private Streets, 2nd ed. (1911), where it is stated at pp. 106–7 that the authority before passing this first resolution "would do well to consider whether the apportionment . . . . is to be confined to premises actually fronting, adjoining, or abutting on the street"; and where at p. 229 a form of that first resolution is given which makes provision for directing an apportionment on premises access to which is obtained from the street through a court, passage, or otherwise. In the present case the first resolution of the respondents, in dealing with the provisional apportionment, only mentioned premises fronting, adjoining, or abutting on the street. That resolution did not therefore authorize the provisional apportionment which was made by

(1) [1911] 2 K. B. 846. (2) [1915] 3 K. B. 707.

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the respondents' surveyor in so far as that apportionment purported to apportion the expenses on premises access to which is obtained from the street through a court, passage, or otherwise. Neither did the second resolution of the respondents authorize or ratify the provisional apportionment as regards these last-mentioned premises. As that resolution approved an irregular provisional apportionment, there was an error in respect of it within the meaning of s. 7 (*c*), and the objection could be taken to it under that clause that it was wholly mistaken. In any case, the second resolution did not authorize the provisional apportionment as regards premises which did not front on the street, because that resolution did not show that the respondents thought it just that these premises should also be included in the apportionment.

Joshua Scholefield for the respondents. The appellant's house was rightly included in the provisional apportionment, which should be allowed to stand.

First, the appellant's house is so connected with the street that it could properly be included in a provisional apportionment under the Act of 1892 of the expenses of making good that street. Under s. 10 of the Act the provisional apportionment may include not only premises "fronting, adjoining, or abutting" on the street in respect of which the expenses are incurred, but also premises "access to which is obtained from the street through a court, passage, or otherwise" and which in the opinion of the authority will be benefited by the works. The appellant's house is a house which comes within these latter words. The lane which communicates between the appellant's house and the said street is a "passage" within that section. That is no doubt a term of wide meaning including roads of various kinds, and may be a "street" within s. 5 of the Act of 1892, which adopts the definition of street given in s. 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). The question here, however, is whether the appellant's house is one access to which is obtained from the street through a passage within s. 10 of the Act of 1892. The true test to be applied in order to answer that question

is that which was laid down in *Newquay Urban Council* v. *Rickeard* (1)—namely, whether on the one hand the road or lane connecting the premises with the street which is being made good was made primarily for the purpose of giving access to the premises from the street, or on the other hand is, or is intended to become, a public street. That test was not dissented from in *Chatterton* v. *Glanford Rural Council.* (2) Here the magistrate has found in effect that the lane in question was made for the purpose of giving access to the appellant's premises and was not intended to become a public street.

Secondly, the resolutions passed by the respondents were valid and effectual for the purpose of authorizing a provisional apportionment of the expenses of making good Cross Street against premises other than those fronting, adjoining, or abutting on that street. This appears from the scheme of the material provisions of the Act of 1892. The first of these is s. 6. Under sub-s. 1 of that section when a street is not made good the urban authority in the first instance pass a resolution requiring the necessary works to be done, and thereupon the expenses, though not mentioned in the resolution, shall be apportioned on the premises fronting, adjoining, or abutting on the street, but "subject as in this Act mentioned"—these words referring to the subsequent provision to be mentioned immediately under which the expenses may be apportioned on certain premises which do not front upon the street. Under sub-s. 2 the surveyor shall prepare a provisional apportionment of the estimated expenses among "the premises liable to be charged therewith under the Act," which shall be submitted to the authority who may by resolution approve it with or without modification. Under sub-s. 3 the resolution approving the provisional apportionment shall be published and copies served on the owners shown as liable to be charged. Sect. 10 provides that in a provisional apportionment the apportionment of expenses against the premises fronting on the street shall, unless the authority otherwise resolve, be apportioned according to

(1) [1911] 2 K. B. 846. (2) [1915] 3 K. B. 707.

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the frontage of these premises; but that the authority in settling the apportionment may include any premises access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works. In the present case the proceedings were entirely in accordance with these provisions. The respondents in the first place passed a resolution that the street should be made up and that their surveyor should prepare (inter alia) a provisional apportionment of the estimated expenses among the persons liable to be charged; and it was unnecessary that in the first instance the authority should do more than that. The surveyor thereupon made, as he was entitled to make, a provisional apportionment including the owners of premises which in his opinion, subject to the approval of the respondents, were premises access to which was obtained from the street through a court, passage, or otherwise, and which would be benefited by the works. The respondents then passed their second resolution approving the provisional apportionment and a copy of that resolution was served upon the appellant. If the appellant desired to raise in respect of the provisional apportionment any of the objections specified in s. 7 of the Act, it was her duty to make the objection as soon as the last-mentioned resolution was served upon her, while the matter was still in the minds of the respondents and they were able effectively to deal with it. The appellant instead of taking her objections as soon as the said resolution was served upon her allowed a fortnight to elapse before doing so. If the first resolution of the respondents was not sufficient to authorize a provisional apportionment of the expenses upon persons other than frontagers, the second resolution was of itself sufficient for that purpose: *Mullis* v. *Hubbard*. (1)

du Parcq replied.

Nov. 2. The following judgment of the Court (Lord Trevethin C.J., Sankey J. and Acton J.) was read by

LORD TREVETHIN C.J. In pursuance of resolutions passed

(1) [1903] 2 Ch. 431.

on August 24 and September 28, 1920, and acting under the Private Street Works Act, 1892, the respondents decided to make up a street known as Cross Street within their borough and approved of the specification, estimate, and provisional apportionment prepared by their surveyor with reference to the work to be executed.

This case is stated by the learned stipendiary magistrate of Merthyr Tydfil to obtain the decision of the Court on two points: (1.) Whether the premises of the appellant were liable to be included in the apportionment, as they have been by the respondents under s. 10 of the above-mentioned Act, which provides among other things that the urban authority, if they think just, may include any premises access to which is obtained from the street through a passage and which in their opinion will be benefited by the works, although not fronting, adjoining, or abutting on the street. (2.) Whether the resolutions were in order and complied with the terms of the Act. [His Lordship stated the facts above mentioned relating to the appellant's house, the said terrace, street, and lane and continued:] On August 24, 1920, the respondents passed the following resolution: "Resolved that the street known as Cross Street which lies between the pine ends of Nos. 10 and 11 Awelfryn Terrace . . . . be levelled, ballasted, metalled, gravelled, and otherwise made good and that the Borough Surveyor in accordance with the provisions of the Private Street Works Act, 1892, prepare as respects such Street: (*a*) A specification of the work with plans and sections; (*b*) An estimate of the probable expenses of the works; (*c*) A provisional apportionment of the estimated expenses among the persons liable to be charged therewith under the Act. Resolved further that the Council deem it just and accordingly do order that in settling the apportionment of the expenses among the several owners of the houses and lands fronting, adjoining, or abutting on the above mentioned street regard should be had to the following considerations: (*a*) The amount and value of any work already done by the owners or occupiers of such premises; (*b*) The greater or lesser degree of benefit to be derived by any premises from such works." The respondents'

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surveyor prepared an estimate of the probable expenses of the said works and the provisional apportionment was served on the owners of the houses in Awelfryn Terrace, including the appellant, requiring each to contribute 2*l.* 1*s.* 6*d.* On September 28, 1920, the respondents passed the following resolution: "Resolved that this council hereby approve of the plans specification, estimate, and provisional apportionment prepared by their surveyor with reference to certain street works required to be executed at Cross Street between pine ends of Nos. 10 and 11 Awelfryn Terrace, Penydarren, in pursuance of the resolution to execute such works passed by us on the 24th day of August, 1920." This resolution was duly published; objection was taken thereto by the appellant, and the matter came before the learned stipendiary.

It was contended on behalf of the appellant: (1.) That the side and back lane in question were not within the meaning of the said section a passage through which access to No. 1 Awelfryn Terrace was obtained from Cross Street; (2.) that the resolutions referred to were insufficient to enable a provisional apportionment to be made, because the first of them made no reference to the houses in Awelfryn Terrace and did not show that the respondents had in the words of s. 10 thought just to include such houses. The learned magistrate decided both contentions against the appellant.

As to (1.): Was this side and back lane within the meaning of s. 10 a passage through which access to No. 1 Awelfryn Terrace was obtained from Cross Street?

It might be suggested that this was a question of fact for the magistrate himself, but he has stated it, and it was argued, as a point of law, a course which was apparently taken in the two cases which have been decided upon these words: *Newquay Urban Council* v. *Rickeard* (1) and *Chatterton* v. *Glanford Rural Council.* (2) It was pointed out by Lord Alverstone C.J. in the *Newquay Case* (3) that in a provisional apportionment under s. 10 of the Act there may be included premises access to which is obtained through a private

(1) [1911] 2 K. B. 846. (2) [1915] 3 K. B. 707.
(3) [1911] 2 K. B. 852.

road made primarily for the purpose of giving access thereto, but not premises access to which is obtained through a road which is or is intended for a public street. Pickford J. further lays down that some limitations must be placed upon the word "access" in the section, and he says (1): "I agree that access from a street to premises by means of another public street is not access within the meaning of s. 10. If it were, there would be practically no end to the premises to which access may be obtained. By such means as that access may be had from the Strand to the Chelsea Embankment. The effect of the words must be restricted by excluding cases of that description." It is true that by s. 5 of the Act of 1892 it is provided that the word "street" means, unless the context otherwise requires, a street as defined by the Public Health Act, 1875, and by s. 4 of that Act the word "street" does include "passage" whether a thoroughfare or not, and that it was held in the case of *Reg.* v. *Goole Local Board* (2) that a not dissimilar lane to the present one was a passage and so a street within the meaning of the section referred to; but we think that what we have to determine is the meaning of the words "access to which is obtained from the street through a . . . . passage" in s. 10 of the Act of 1892, and that the definition of "passage" in s. 4 of the Act of 1875 is by no means conclusive. The word "passage" standing by itself is one of very wide meaning. It is defined in Murray's Oxford Dictionary as that by which a person or thing passes or may pass, a way, a road, path, route, channel, an entrance or exit. As, however, has already been shown the words "access to which is obtained from the street through a . . . . passage" cannot be construed in their widest and most literal meaning. It is not desirable, nor do we propose, to lay down any definition of the words. We are not prepared to hold, as suggested, that a passage to be within the Act must be the only means of approaching the street to be made up, but we are of opinion that it means something in the nature of a feeder of the street. There are in many towns, and examples can

(1) [1911] 2 K. B. 853. (2) [1891] 2 Q. B. 212.

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be seen within a short distance of these buildings, courts or alleys standing back from the street, access to which is reached through a passage, sometimes open, sometimes under houses fronting on the street, and although we do not say that such a court and such a passage are alone within the meaning of the words in the section, we cannot hold that a back lane and a side lane such as these in this case which were meant to be back lanes and side lanes for the houses fronting on Awelfryn Terrace, are passages by which access to Cross Street is obtained within the meaning of that section.

As to (2.), the adequacy of the resolutions. It must be borne in mind that two resolutions are contemplated by the Act. There is the resolution under s. 6, which is the initiation of the proceedings. It will be observed that this first resolution is one which need not be published, and which concerns the council itself. It may well be that at the time they pass such a resolution a council are not aware of any premises which are not fronting, adjoining, or abutting on the street, but access to which is obtained from the street through a court, passage, or otherwise. The surveyor, however, when set in motion has duties under s. 6, sub-s. 2, and he may draw the attention of the council to such houses as above mentioned by including them in his specification estimate and provisional apportionment. It then becomes the right of the council to pass a second resolution under s. 6, sub-s. 3, approving the provisional apportionment, which includes such houses, but this they can only do if they think it just to include such houses. This second resolution was passed in the present case, and from the fact that the council have included the houses in Awelfryn Terrace it must be assumed that they thought it just to do so. We think it would be more in conformity with the provisions of the Act that the resolution should state expressly that the council "think it just to include" such houses. For the purposes of persons objecting this is the really important resolution, because it has to be published so that objection may be made.

We think that the inclusion of the houses in question in the second resolution was sufficient, and that each

resolution complied with the terms of the Act and was in form valid.

In the result, while upholding the learned magistrate on the second point, we are of opinion that he was wrong on the first one, and the appeal is accordingly allowed with costs.

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Appeal allowed.

Solicitor for appellant: *E. A. Howell, for Simons, Smyth & Daniel, Merthyr Tydfil.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for T. A. Rees, Merthyr Tydfil.*

J. R.

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Nov. 4.

Firearms—Certificate—Obligation to hold—Exemption—Officer of Post Office—"Acting in the course of his duties"—Firearms Act, 1920 (10 & 11 *Geo.* 5, *c.* 43), *s.* 1, *sub-s.* 1; *sub-s.* 8 (*f*).

The Firearms Act, 1920, s. 1, provides: "(1) A person shall not purchase, have in his possession, use, or carry any firearm or ammunition unless he holds a certificate (in this Act called a firearm certificate) granted under this section, and in force at the time. . . . . "(8) . . . . Provided that no offence under this section shall be deemed to be committed . . . . (*f*) in the case of an officer of the Post Office by having in his possession, using, or carrying a firearm or ammunition when acting in the course of his duties":—

Held, that the above proviso (*f*) enables an officer of the Post Office to have in his possession or carry a firearm without a certificate only when he has a firearm in his possession for the purpose of its transmission through the post, or when he is authorized by his superiors to carry a firearm.

CASE stated by justices for the county of Westmoreland.

On March 12, 1921, an information was preferred before the justices sitting at Appleby as a court of summary jurisdiction by Edwin Dickinson, a superintendent of police (hereinafter called "the appellant"), against James Harold Bainbridge (hereinafter called "the respondent") charging that the respondent unlawfully had committed an offence

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against the Firearms Act, 1920, s. 1, sub-s. 1 (1), in that he had in his possession a certain firearm and ammunition without having a firearms certificate as required by that section.

At the hearing of the information the following facts were proved :—

The respondent resided at, and had for the then last ten years been the postmaster of the sub-post-office at, Temple Sowerby, about eight miles from Penrith, and in the Penrith postal district. That office afforded postal facilities for a large country area. When the takings at the office exceeded 20*l.* they were remitted by the night mail cart to Penrith ; and when they did not amount to that sum they were retained by the respondent, who frequently had in his possession cash to the amount of 15*l.* to 20*l.* together with unissued postal orders, war savings certificates, and inland revenue licences of the value of about 300*l.* The respondent was also the owner of a shop and grocery business at Penrith, where he was in the habit of going in the morning on each week day, in order to attend to that business, returning at night to Temple Sowerby. Whilst he was attending to that business his wife, with the approval of the Post Office authorities, performed his duties as postmaster. On the date next hereinafter mentioned the respondent attended as usual at his shop at Penrith. On February 21, 1921, during the whole of the day, the respondent had in his possession at Temple Sowerby a revolver and ammunition for it. The revolver had been in his possession for about twenty years. The respondent had not at any time been required by the Post Office regulations or by any one in authority over him to possess, carry, or use any firearms, nor had he been authorized by the Post Office authorities to do so.

The respondent did not at any time hold a firearms certificate, as required and defined in s. 1 of the Firearms Act, 1920.

(1) The material provisions of the Act are set out in the headnote and in the judgments.

There was no evidence before the justices that the said revolver had ever been used or fired by the respondent during the years in which it had been in his possession.

It was contended for the respondent that he, being an officer of the Post Office within s. 1, sub-s. 8 (*f*), of the above Act, was not required to hold a certificate, and that no offence had been committed by him, as the revolver and ammunition were held by him for the purpose of the protection of Post Office property entrusted to his care, and were in his possession as an officer of the Post Office acting in the course of his duties.

It was contended for the appellant that the respondent was required by the Act to hold a certificate, and that he was not exempt from the restrictions of the Act unless in the course of his duties he was required to possess, carry or use firearms or ammunition; and, alternatively, that the respondent was only so exempt at such times as he was in fact performing his duties as postmaster.

The justices were of opinion that, by virtue of the proviso in s. 1, sub-s. 8 (*f*), of the Act, the respondent was exempt from the restrictions in s. 1, sub-s. 1, inasmuch as he was an officer of the Post Office having the revolver and ammunition in his possession when acting in the course of his duties as such officer, and being of opinion that he was therefore not required to hold a firearms certificate, they acquitted the respondent and dismissed the information.

The question of law for the Court was whether the respondent was exempt from the restrictions in s. 1, sub-s. 1, of the said Act by virtue of the proviso in s. 1, sub-s. 8 (*f*). If the Court should be of opinion that the order dismissing the information was legally made that order was to stand; but if the Court should be of opinion to the contrary the Court was solicited to remit the case to the justices with the opinion of the Court thereon or to make such other order as to the Court might seem fit.

Walter Frampton and *R. Bush James* for the appellant. Under s. 1, sub-s. 1, of the Firearms Act, 1920 (1), the

(1) See note (1) ante, p. 424.

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respondent, having a firearm in his possession, was bound to hold a firearm certificate, and under sub-s. 8 he committed an offence in not holding a certificate, unless he came within clause (*f*) of the proviso to the latter sub-section, which provides that no offence under the section shall be deemed to be committed "in the case of an officer of the Post Office by having in his possession, using, or carrying a firearm or ammunition when acting in the course of his duties." The respondent did not come within that clause. The clause exempts an official of the Post Office from the obligation of s. 1, sub-s. 1, only where the firearm is in his possession when he is acting in the course of his duties. The duties of an officer of the Post Office are to assist in transmitting letters and parcels through the post; and the clause means that the officer is to be entitled to have a firearm in his possession without licence only where he has possession of it for the purpose of assisting in its transmission through the post, and possibly also where he is authorized or required by a superior officer to carry a firearm in order to safeguard the transmission of matter through the post. In the present case the respondent had the revolver and ammunition in question in his possession neither for the purpose of transmission through the post, nor because he had been authorized to have them. Clause (*f*) does not mean that an officer of the Post Office is to be exempt from the obligation of s. 1, sub-s. 1, by virtue merely of his employment in that capacity. Most of the officials of the Post Office are untrained in the use of firearms and many of them are young persons, and it cannot have been the intention of the clause that any of them who chose to do so should be entitled to carry a firearm without having a certificate. If that had been the intention, the language of clause (*f*) would have been similar to that of clause (*a*), which exempts a person in the naval, military, or air service having in his possession a firearm "in his capacity as such." The clause does not entitle a postmaster to have a firearm in his possession without a certificate merely for the purpose of protecting the post office against attack. If he thinks it necessary

to possess a firearm for that purpose his proper course is to take out a certificate. In the present case the respondent cannot be heard to say that he had the revolver in his possession for the protection of the post office, because he had it in his possession for ten years before he became postmaster, and during the whole of the day in question it was in his own possession and not in that of his wife, though he was in Penrith and she was acting as postmaster and in charge of the post office.

The respondent did not appear in person or by counsel.

SANKEY J. This is a case stated for the decision of the Court on the construction of s. 1, sub-s. 8 (*f*), of the Firearms Act, 1920. That section enacts that a person shall not have in his possession any firearm or ammunition unless he holds a firearm certificate, and the clause in question provides that there shall be an exception in the case of an officer of the Post Office having in his possession a firearm or ammunition when acting in the course of his duties.

The facts of the case are as follows, [His Lordship stated the facts, and continued :] It was contended on behalf of the respondent, and the contention was upheld by the justices, that the respondent, being an officer of the Post Office within the meaning of the exception clause, was not required to hold a certificate, and that no offence had been committed by him, inasmuch as the revolver and ammunition were held by him for the protection of Post Office property and were in his possession as an officer acting in the course of his duties.

In order to determine whether or not that contention is well founded it is necessary to examine closely the relevant provisions of s. 1 of the Act. Sub-s. 1 of that section enacts that "A person shall not purchase, have in his possession, use, or carry any firearm or ammunition unless he holds a certificate (in this Act called a firearm certificate) granted under this section, and in force at the time." The section thus contains in the first place a total prohibition of the possession of firearms by any person, unless he has obtained a certificate. Sub-s. 8 of the section, however, has a proviso

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granting exceptions in favour of certain persons, which so far as material to this case is as follows: "Provided that no offence under this section shall be deemed to be committed— . . . . (*f*) in the case of an officer of the Post Office by having in his possession, using, or carrying a firearm or ammunition when acting in the course of his duties."

The respondent's view is that he being an officer of the Post Office had the firearm and ammunition in question in his possession when acting in the course of his duties, and that he was therefore excused by that clause from holding a firearm certificate.

On the other hand it was contended on behalf of the appellant that sub-s. 8 (*f*) only protects an officer of the Post Office who has a firearm in his possession in the actual performance of his duty—namely, when in the course of his duty he receives a firearm for transmission through the post, or when he carries a firearm because he is required or authorized to do so by a superior officer. It seems to me that that contention is well founded, and that the protection is limited to the cases mentioned.

As to the first of these cases, that namely of the transmission of a firearm through the post, it is to be remembered that the prohibition in s. 1, sub-s. 1, is total, and that an officer of the Post Office who had a firearm in his possession even for the purpose of its transmission through the post without holding a certificate, would commit an offence against the Act, unless he was specially exempted from liability. I think that sub-s. 8, proviso, clause (*f*), covers that case and protects an official of the Post Office having in his possession a firearm for transmission through the post in the course of his duty. A good deal of light is thrown upon that clause when it is considered along with clause (*c*), which provides that the offence is not committed "in the case of any person carrying on the business of common carrier or warehouseman by having in his possession or carrying a firearm or ammunition in the ordinary course of that business." It seems to me that clause (*f*) affords to an officer of the Post Office a protection similar to that which clause (*c*) gives to a common

carrier who has a firearm in his possession in the ordinary course of his business.

As to the other case mentioned, I think that clause (*f*) in providing that the offence shall not be committed by an officer of the Post Office having in his possession or carrying a firearm when "acting in the course of his duties" would apply to that case also and would protect an officer of the Post Office who in the course of his duty carried a firearm because he was authorized or required to carry a firearm in the course of his duty.

Having regard to the respondent's contention before the justices that he being an officer of the Post Office was not obliged to hold a certificate, and that no offence had been committed by him as the firearm was in his possession as such officer acting in the course of his duties, I think it is important to consider the difference between clause (*f*) and clause (*a*) of the proviso. Clause (*a*) provides that no offence under the section is committed in the case of any person "in the naval, military, or air service of His Majesty . . . . by having in his possession a firearm or ammunition in his capacity as such, or by using or carrying a firearm or ammunition in the performance of his duty as such"—that is in his capacity as a naval, military, or air servant of His Majesty. When we come to clause (*f*), which deals with the officer of the Post Office, we find that the words "in his capacity as such" are omitted, and that the only words used are "having in his possession, using, or carrying a firearm or ammunition when acting in the course of his duties."

It would seem to follow that an officer of the Post Office does not get exemption from the requirement of s. 1, sub-s. 1, merely by being employed as an officer of the Post Office, but only when in the course of his duty he is in possession of a firearm for transmission through the post, or when he is authorized or required by a superior officer to carry a firearm.

In the present case the respondent was not in possession of the firearm for the purpose of transmitting it through the

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post; and there is an express finding in the special case that he had not at any time been required or authorized to possess or carry a firearm.

I therefore think that the justices were wrong in law in dismissing the information, and the case should be remitted to them with a direction either to convict the respondent, or to deal with the matter under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17), as in their discretion they may think fit.

BRANSON J. I am of the same opinion. I only desire to add one observation. In case it may be thought that the view which has been expressed regarding the meaning of the words in s. 1, sub-s. 8, proviso (*f*), "having in his possession" a firearm when acting in the course of his duties, makes "possession" apply to possession in too restricted a sense, I would point out that it appears from clause (*g*) of the proviso that a person having a firearm in his possession only in a very limited sense is considered to need exemption. The latter clause provides that an offence is not committed "in the case of a person carrying a firearm or ammunition belonging to a person holding a certificate under this Act, by having in his possession such firearm or ammunition under instructions from and for the use of such certificated person for sporting purposes only." Under that clause a person who might only be entitled to have a firearm in his possession while carrying it over a fence for the use of a certificated person for sporting purposes is thought to need protection. That clause seems to me to assist one in coming to the conclusion indicated by my learned brother that the purpose of clause (*f*) is to protect an officer of the Post Office only when he carries a firearm in the actual course of his duties.

LORD TREVETHIN C.J. I have found this case to be one of some difficulty, but on consideration I have come to the same conclusion as that at which my learned brethren have arrived. I agree that the object of the Act is to restrict the carriage of lethal weapons by the public at large, and I therefore think

that s. 1, sub-s. 8, proviso (*f*), which exempts an officer of the Post Office in certain cases from the scope of the Act, ought to be strictly construed.

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DICKINSON *v.* BAINBRIDGE.

Appeal allowed; case remitted.

Solicitors for appellant: *Rooke & Sons, for Arnison & Co., Penrith.*

J. R.

HACKNEY BOROUGH COUNCIL *v.* DORÉ.

1921

Nov. 14.

Electric Light—Local Authority—Obligation to supply Energy—Penalty imposed for non-supply unless Default caused by force majeure—Probability of strike of Workmen.

By their Electric Lighting Order the appellants were, upon being duly required, bound to give a supply of energy to premises in their district, and if they made default they were made liable to a penalty unless the Court should be of opinion "that such default was caused by inevitable accident or force majeure."

Proceedings having been taken against the appellants for making default in giving the respondent a supply of energy, they contended that they were not liable to a penalty, inasmuch as any default on their part was caused by circumstances amounting to force majeure. The circumstances, as found by the magistrate, were that two of the appellants' workmen refused to do the work required, because the wiring of the respondent's house had been carried out by a man who was not a member of a trade union; that if the appellants had dismissed these men, "the result would probably have been" that the Electrical Trades Union would have caused all their members in the appellants' service to terminate their engagements; that if this had occurred it would have been difficult for the appellants to get other competent workmen; and that any interference with the appellants' undertaking by the withdrawal of their workmen would have seriously affected the whole district. The magistrate held that the term "force majeure" applied only to physical or material constraint, and that although it applied to strikes actually proceeding, it did not apply to fear, however reasonable, of the consequences of threatened action. He therefore held that ther had been no force majeure, and that the appellants were liable to a penalty:—

Held that the magistrate was right, inasmuch as a reasonable apprehension of a strike did not in itself amount to force majeure.

CASE stated by a Metropolitan Police Magistrate.

On April 16, 1921, an information was preferred by the respondent Doré under the Hackney Electric Lighting Order,

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1893, against the appellant council for having on April 6, 1921, and subsequent days to April 16, 1921, made default in supplying electric power or energy to his premises.

The following facts were admitted or proved.

The appellants, who were the undertakers for the supply of electricity in their district under the above-mentioned lighting Order as confirmed by the Electric Lighting Orders Confirmation (No. 3) Act, 1893 (56 Vict. c. xl.), were, shortly before April 6, 1921, duly required by the respondent, under clause 24 of the said lighting Order, to give a supply of energy for his premises. The appellants failed to give a supply under the following circumstances: The Electrical Trades Union is a body claiming to represent and numbering in its membership the large majority of electrical workers in the country. All the appellants' electricity employees were members of or acted in conjunction with that trade union. Immediately upon the respondent's application for a supply being received the appellants' electrical engineer instructed an employee in the mains department named Skinner to fix up the meter position on the respondent's premises and this order was obeyed. On March 25, 1921, the appellants' electrical engineer received a notice from another employee in the mains department named Stiling, who was a shop steward of the said trade union, that the respondent's premises were being wired by a non-union firm, and that the men refused to connect the supply. The respondent's contractor who did the work on the respondent's premises himself, was not a member of the masters' federation or of the said trade union. Proper instructions were given in writing to the employees to proceed with the work, and protests were made to the trade union as to the position in which the appellants were placed. On April 6 the appellants' electrical engineer had an interview with Stiling and the jointer (named Sessions) when they informed him that they absolutely refused to do the work. On the same date the appellants' electrical engineer communicated this fact to the respondent's contractor and stated that he was placing the matter before the chairman of the appellants' electricity committee for his

instructions. On April 7 a protest was sent to the said trade union. The appellants in fact used every endeavour to induce the union to permit the work to be done. If the appellants had dismissed the men who refused to obey orders, or if the appellants' electrical engineer had himself connected the respondent's premises, "the result would probably have been" that the union would have caused their men in the appellants' service to give notice to determine their engagements, the jointers being subject to, and able to give at any time an hour's notice. If these men had left the appellants' service it would have been difficult or impossible to have replaced them by competent men outside the Electrical Trades Union, so that a large body of important workers would have been withdrawn from the appellants' electricity undertaking. Any interference with it would affect other undertakings in London physically connected therewith, the appellants' undertaking being responsible for the supply of electricity to many thousands of consumers, 80 per cent. of them being of the factory and power-consuming class.

The respondent contended that there had been default by the appellants and that the default was not excused by the proviso to clause 26 of the Order. (1)

The appellants contended that even if there was evidence of default within clause 26 (which they denied) they were entitled to the protection of the proviso, as the default (if any) was caused by circumstances amounting to force majeure.

The magistrate held that there was default by the appellants, and as to the meaning of the expression "force majeure" he was of opinion, acting upon the guidance to be obtained from decisions upon commercial contracts, that

(1) Hackney Electric Lighting Order, 1893, cl. 26: "Whenever the undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under this Order they shall be liable to a penalty not exceeding forty shillings in respect of every such default for each day on which any such default occurs. . . . . Provided . . . . that in no case shall any penalty be inflicted in respect of any default if the Court . . . . shall be of opinion that such default was caused by inevitable accident or force majeure. . . . ."

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it applied only to physical or material constraint and that although it had been held that the expression applied to strikes actually proceeding, to war, and to breakdown of machinery, it had never been held to apply to fear, however reasonable, of the consequences of threatened action. He therefore came to the conclusion that the appellants were guilty of an offence under the Order and he imposed a penalty.

The question was whether the magistrate was right in point of law.

Scholefield for the appellants. The magistrate was wrong in holding that the circumstances preventing the appellants giving a supply of energy to the respondent did not amount to force majeure. The meaning of this expression has been considered in several cases. In *Yrazu* v. *Astral Shipping Co.* (1) a clause in a contract for the carriage by sea of live-stock provided that the vessel should not call at any port before landing her cargo "except in case of force majeure." Owing to a miscalculation of the master and engineer the steamer left the loading port with insufficient coal and had to put into another port for more coal. Walton J. held that there was in those circumstances no case of force majeure, but his observations clearly show that he regarded force majeure as anything which was beyond the shipowners' control. Much the same view was taken in *Matsoukis* v. *Priestman & Co.* (2) There in construing a contract for the building of a ship which contained an exception of force majeure, Bailhache J. held that delay owing to breakdown of machinery and delay caused by the general dislocation of business as a result of the great coal strike of 1912 constituted a case of force majeure. In *Lebeaupin* v. *Crispin* (3) McCardie J. reviewed the earlier cases and appeared to take the same view that the expression is used with reference to circumstances beyond the control of the person who has been prevented from carrying out his contract. That which cannot

(1) (1904) 9 Com. Cas. 100. (2) [1915] 1 K. B. 681.
(3) [1920] 2 K. B. 714.

be avoided excuses performance: *Industrial Dwellings Co.* v. *East London Waterworks Co.* (1)

[SANKEY J. Do you distinguish between a strike and an apprehension that there will be a strike?]

The appellants did their utmost in the circumstances, and that which happened was unavoidable so far as they were concerned. If they had dismissed their workmen there would inevitably have been a strike.

[SANKEY J. referred to *Mitsui & Co.* v. *Watts, Watts & Co.* (2)]

In this case the appellants are in a better position than if they were relying on an exception of force majeure in a contract. Their obligation is imposed by statute, and where that is the case the party disabled from performing his obligation without any default on his part is excused by law: *Paradine* v. *Jane* (3), cited with approval in *Sheffield Waterworks Co.* v. *Carter.* (4)

G. L. Hardy for the respondent. The magistrate was right in holding that the term "force majeure" applies only to physical or material constraint operating upon the appellants. Here there was no physical or material constraint operating upon them. The fear of interference, which is the utmost the appellants can allege, does not suffice to excuse them. As was said in *Mitsui & Co.* v. *Watts, Watts & Co.* (2), where the material exception in a charterparty was "restraint of princes," a reasonable apprehension of a restraint operating in the near future does not amount to a restraint of princes. See, too, *Kacianoff* v. *China Traders' Insurance Co.* (5) where fear of capture was held not to amount to a constructive total loss. No distinction can be made between the term "force majeure" as used in a contract and as used in a statute.

DARLING J. I have come to the conclusion, with great reluctance, that this appeal fails. [His Lordship read the

(1) (1894) 58 J. P. 430.
(2) [1916] 2 K. B. 826; [1917] A. C. 227.
(3) (1647) Aleyn, 26.
(4) (1882) 8 Q. B. D. 632, 645.
(5) [1914] 3 K. B. 1121.

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magistrate's findings and continued:] It is obvious that, if the appellants had dismissed the two men who refused to carry out the work, the whole of Hackney would probably, as the magistrate finds, have been plunged in darkness; it would have had neither light nor power; and the consequences to Hackney would have been disastrous, and all because two men, acting by the direction of their trade union, refused to connect the house which had been wired by a man who was not a trade unionist. If it were absolutely certain that the undertaking would have been brought to a stop if the two men had been dismissed, I should have said that the impasse would have occurred by force majeure. In my opinion a distinction is to be made between cases of contract and cases where the liability is imposed by statutory authority. The expressions in the judgments cited which describe how a person has put himself voluntarily in the position of undertaking to do a certain thing cannot apply to an obligation imposed by statute; but the authorities show that a reasonable apprehension of danger is not in itself force majeure. The nearest definition supporting the appellants' contention is in the judgment of Phillimore L.J. in *Mitsui & Co.* v. *Watts, Watts & Co.* (1) where he says: "Where it is certain, or so nearly certain that in commercial matters it can be considered as certain, that the adventure cannot be successfully completed, the shipowner or charterer may be excused from taking preliminary steps which will obviously be futile." Here the magistrate has said what the result would "probably" have been. If he had said "the result would have been," leaving out the word "probably," I think a case of force majeure would have been established. Bankes L.J. in *Mitsui's Case* (2) puts the matter with great clearness where he says. "In the present case the most that can be said is that there was reasonable apprehension that before the time arrived to complete the performance of the contract a restraint of princes would arise which would prevent its complete performance. In my opinion that is no answer to the allegation that there was

(1) [1916] 2 K. B. 826, 845. (2) [1916] 2 K. B. 826, 850.

a breach of contract." I think his phrase, "there was a reasonable apprehension," is equivalent to the magistrate's finding that "the result would probably have been." This comes very near being a case of force majeure. To many people it must appear monstrous that those controlling a great undertaking like this should have to arrive at absolute certainty as to the result of dismissing these two men before they can plead force majeure; I do not say that it would be necessary for them to wait until a general strike and Hackney had been plunged in darkness; but I content myself by saying that on the magistrate's finding, a case of force majeure has not been made out.

SANKEY J. I agree. I regret the introduction of foreign words into English statutes and Orders without any definition of them being given. In my view "force majeure" in this case means some physical or material restraint, and does not include a reasonable fear or apprehension of such a restraint. Here, no force majeure had ever begun to operate, and it would be opening a wide door to uncertainty were we to pay regard not to the force but to the fear which it was alleged to inspire. "Fear" is a term relative to the courage or embarrassment of the person who experiences it.

BRANSON J. Sankey J. has expressed with great accuracy my view as to the meaning of "force majeure." I will only add this, that the distinction which he draws between the fear of the application of some force and the application of the force itself is to my mind justified by the decisions of the Courts in the analogous case of restraint of princes. In *Becker, Gray & Co.* v. *London Assurance Corporation* (1) the distinction is drawn between a restraint of princes preventing a ship from completing her voyage and action taken by the master before the restraint has actually begun to operate which induced him to give up the voyage and not persist in the attempt to complete it. I think that the present appellants yielded to a threat, and so failed to

(1) [1918] A. C. 101.

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persist in the attempt to do the work which might have been successful. In my view "force majeure" cannot be established by showing that the consequences of doing the act which would be suffered by the person relying upon the clause would be unpleasant, troublesome or perhaps disastrous. In order to succeed, the appellants must show that what the statute ordered them to do has become impossible; it is not enough for them to say that it has become inconvenient or unpleasant for them to do it. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *R. H. R. Tee, Town Clerk, Hackney.*

Solicitors for respondent: *Tilley & Watts.*

J. S. H.

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Nov. 15.

SHUTER *v.* HERSH.

Landlord and Tenant—Notice to quit—Expiry of Notice—Tenant holding Over—Statutory Tenancy—Subsequent Increase of Rent—Necessity for fresh Notice to quit—Acceptance of Rent by Landlord—Waiver of Notice—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 3, 15, 16.

Where a tenant remains in possession under the provisions of the Increase of Rent, &c., Restrictions Act, 1920, after receiving notice to quit, there is no necessity for the landlord to give the tenant a fresh notice to quit before raising the rent to the extent permitted by the Act unless a new tenancy has been actually created, and the mere fact that the landlord accepts rent after giving the notice to quit cannot be taken as a waiver by him of the notice to quit so as to create a new tenancy.

APPEAL from the Whitechapel County Court.

The plaintiff, who was the tenant of a house to which the Increase of Rent, &c. (Restrictions), Acts applied, sublet a portion of the house in 1917 to the defendant at a rent of 10*s.* per week. On May 9, 1920, the plaintiff gave the defendant notice to quit, expiring on May 16. At the same time the

plaintiff served upon the defendant a notice increasing his rent. The defendant remained in possession and paid the increased rent for a period of more than three months. Subsequently the plaintiff served upon the defendant two further notices of increase of rent which were complied with by the defendant. The plaintiff finally served another notice of increase of rent upon the defendant which the defendant refused to comply with. The plaintiff thereupon commenced proceedings in the county court to recover possession of the premises on the ground that rent was in arrear. No notice to quit was served upon the defendant subsequent to the notice of May 9, 1920.

The county court judge held that the last notice of increase of rent was not a valid notice, because no notice to quit was served with it or about the same time as it was given and that therefore no rent was in arrear. As rent had been taken by the plaintiff for more than three months after the expiry of the notice to quit of May 9, 1920, the plaintiff, after the expiry of those three months, was not "but for this Act entitled to possession," and therefore was not entitled to the increase. He decided against the plaintiff's contention that if a notice to quit had once been given there was no need at any subsequent date to give a fresh notice to quit before serving a further notice of increase of rent. The Act of 1920 (1) allowed

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3, sub-s. 1: "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession. . . . ."

Sect. 15, sub-s. 1: "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice."

"Provided that, notwithstanding anything in the contract of tenancy, a landlord who obtains an order or judgment for the recovery of possession of the dwelling-house or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant."

Sect. 16, sub-s. 3: "Where the landlord of any dwelling-house to

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three months' rent to be accepted after notice to quit had expired and provided in s. 16 that acceptance of rent for that period was not to invalidate such notice. He inferred from that that if more than three months' rent had been accepted there was then no valid notice to quit in existence. It had been decided that a notice to quit must be given before or with or about the same time as the first notice of increase, if that notice to quit had gone by acceptance of rent for more than three months, a fresh notice to quit must be given before a further increase of rent was recoverable. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Turrell for the plaintiff. Where a common law tenancy of a house coming within the Increase of Rent Restrictions Acts has been determined by a notice to quit and the tenant by remaining in possession becomes a statutory tenant under those Acts, it is not necessary for the landlord to serve upon the tenant a fresh notice to quit before serving notice of increase of rent within the limits permitted by the Act. The acceptance of rent by the landlord for more than three months after the expiry of the notice to quit does not amount to a waiver by the landlord of the notice to quit. If the contention be correct that the effect of the acceptance of rent for a period of more than three months after the expiration of the notice to quit is to terminate the statutory tenancy and to create a new common law tenancy, the result would be that that new tenancy would have to be terminated by a fresh notice to quit before the rent could be increased, which in the case of a yearly tenancy would mean that a six months' notice would be required running from the expiration of 18 months from the commencement of such tenancy and therefore in that case the Act would have expired before the rent could be

which this Act applies has served a notice to quit on a tenant, the acceptance of rent by the landlord for a period not exceeding three months from the expiration of the notice to quit shall not be deemed to prejudice any right to possession of such premises, and, if any order for possession is made, any payment of rent so accepted shall be treated as mesne profits."

increased. In *Hartell* v. *Blackler* (1) it was decided by the Divisional Court that the acceptance of rent after the expiration of a notice to quit operated as a waiver of the notice and a recognition of the continuance of the tenancy. That decision was based upon *Davenport* v. *The Queen* (2) and *Croft* v. *Lumley* (3), which were both cases of forfeiture, and the position was treated as the same as in forfeiture. A forfeiture, however, can always be waived by the acceptance of rent by the landlord. The decision in *Hartell* v. *Blackler* (1) is in direct conflict with the earlier decision in *Hunt* v. *Bliss* (4), and it was not followed by the Divisional Court in *Davies* v. *Bristow*. (5) The Court in the latter case pointed out that the principle applicable to cases of forfeiture is not applicable to cases in which the term has been brought to an end by a notice to quit. Full effect can be given to s. 16 of the Increase of Rent (Restrictions) Act of 1920, on which the county court judge relied, by applying it to cases of forfeiture. A statutory tenancy continues so long as the tenant performs the conditions laid down in the statute. Judgment for possession can be recovered under s. 5 of the Act of 1920 by proving a breach of those conditions without giving any notice to quit.

Quass for the defendant. The plaintiff is not entitled to possession on the ground that rent is in arrear. The increase of rent which the plaintiff sought to impose is irrecoverable. Under s. 3 of the Act of 1920 no increase of rent is authorized except in respect of a period during which but for the Act the landlord would be entitled to obtain possession. The plaintiff has not shown that but for the Act he would be entitled to possession. When the notice to quit, which was given on May 9, 1920, had expired and the tenant remained in possession and paid the increased rent demanded by the landlord for a period of more than three months which was accepted by the landlord, a new common law tenancy was created which had to be terminated by a proper notice to

(1) [1920] 2 K. B. 161.
(2) (1877) 3 App. Cas. 115.
(3) (1855) 5 E. & B. 648.
(4) [1919] W. N. 331.
(5) [1920] 3 K. B. 428.

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quit before there could be a further increase of rent. It is true that s. 16, sub-s. 3, of the Act of 1920 does not expressly say that the acceptance of rent for a period of three months shall amount to a waiver of the notice to quit, but that is the only reasonable meaning to be given to the words used. The section purports to amend the law, and there would be no amendment of the law if that construction is not the correct one. A statutory tenant is defined in s. 15, sub-s. 1, of the Act as "a tenant who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies." The defendant does not come within that definition, because he retains possession by virtue of a new common law tenancy and not under the provisions of the Act; he therefore is not a statutory tenant. Sect. 15 also sets out the conditions that a tenant who retains possession of a dwelling house under the Act must comply with, including the condition that he shall observe all the terms and conditions of the original contract of tenancy. In the present case one of those terms was that a notice to quit should be given. If that only referred to the notice to quit which must be given by a tenant, the result would be that the Act would be conferring rights on landlords which they did not possess at common law. In *Remon* v. *City of London Real Property Co.* (1) the Court of Appeal limited the meaning of the words "a tenant . . . . shall observe . . . . all the terms and conditions of the original contract of tenancy," because they held that the condition to give up the premises at the expiration of the tenancy by agreement did not apply to a statutory tenant. But to hold that a notice to quit need not be given in order to terminate a statutory tenancy would extend that decision very considerably. The proviso to the section provides that a notice to quit is not necessary where a landlord obtains an order or judgment for the recovery of possession of a dwelling house, and the inference from that proviso is that a notice to quit is necessary in order to terminate a statutory tenancy where there is no order or judgment for recovery of possession

(1) [1921] 1 K. B. 49.

of the dwelling house. It was assumed by the Court in *Peizer* v. *Federman* (1) that a notice to quit was necessary before a notice to increase rent could be given.

Turrell replied.

BANKES L.J. This is an appeal from a decision of a county court judge which raises another question under the Increase of Rent (Restrictions) Act.

The facts as I understand them are shortly these. The plaintiff was himself the tenant of a house, and he sublet a portion of the house in 1917 to the defendant, so that the relations between the plaintiff and the defendant were those of landlord and tenant. Whether or not the rooms occupied by the defendant came within the scope of the Rent Restriction Act of 1915 it is not necessary to decide. Sect. 5 of the Act of 1919, which by the marginal note is described as containing "minor amendments of the principal Act," contains this provision for the first time: "Any rooms in a dwelling house the subject of a separate letting as a dwelling shall, for the purposes of the principal Act and this Act, be treated as a part of a house let as a separate dwelling." This provision is inserted in the Act of 1919 for the first time, and therefore these rooms clearly, after the passing of that Act, came within the scope and operation of the Increase of Rent Restriction Acts. On May 9, 1920, before the passing of the Increase of Rent Restriction Act of 1920, the landlord gave the tenant a notice to quit, to expire on May 16. It was contended by counsel for the defendant that that notice was not a good notice to quit, and therefore the case must be treated as one where there was no notice to quit at all. I cannot come to that conclusion upon this evidence. The point does not seem to have been taken in the county court, and I do not think that it is fair to draw any inference on the question of fact, and I will assume therefore that the notice of May 9 was in law a good notice to quit. A notice of increase of rent was

(1) [1921] W. N. 320.

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served at the same time as the notice to quit. In *Hill* v. *Hasler* (1) it was decided by Lord Sterndale M.R. and Atkin L.J., sitting as a Divisional Court, that a notice to increase rent was not invalid because it was served at the same time as the notice to quit. So that I will assume, for the purposes of my decision, that a valid notice to quit was served on the defendant in May, 1920, and that a statutory notice of increase of rent was served upon him at the same time. The defendant continued to pay the increased rent for a considerable time. There were, after that date, two further notices of increase of rent which were complied with by the defendant. Finally the plaintiff served a third notice of increase of rent which the defendant refused to comply with. The plaintiff thereupon commenced proceedings in the county court in ejectment, and his case was that he was entitled to possession on the ground that the defendant had not paid the rent which was lawfully due from him. The defendant replied by saying that the rent which the plaintiff claimed was not lawfully due to him, because the increase of rent which he sought to make was not justified by the Act. The county court judge has held as a matter of law that the notice to quit, which was served in May, 1920, was not sufficient to authorize the plaintiff under s. 3, sub-s. 1, of the Act of 1920 to increase the rent as being entitled to obtain possession of the premises but for the Act. He came to that conclusion, as I understand, because of the construction he placed upon s. 16, sub-s. 3, of the Act—namely, that upon the payment of rent for a period of more than three months after the expiration of the notice to quit a fresh tenancy was created between plaintiff and defendant, and that, therefore, in order to terminate that fresh tenancy a fresh notice to quit must have been given, and until that notice had been given the plaintiff was not in a position to demand any new statutory increase of rent. I do not place the same construction that the county court judge did upon sub-s. 3 of s. 16, and I cannot draw the inference of fact from the mere acceptance of rent by the plaintiff

(1) [1921] 3 K. B. 643.

between May, 1920, and the date he commenced these proceedings that any fresh tenancy between these parties was created. I accept the view expressed by Shearman J. in *Davies* v. *Bristow* (1) as to the effect of giving notice to quit and subsequently the acceptance of rent under the Rent Restriction Acts. Shearman J. says this: "As long as s. 1, sub-s. 2, of the Rent Restriction Act, 1915, and s. 1 of the Act of 1919 are in force"—and now, of course, so long as the Act of 1920 is in force—"and a landlord is prevented from getting recovery of possession of premises after the expiration of a notice to quit, I think it is correct to say the former tenant by holding over no longer becomes a trespasser but is in lawful statutory occupation of the premises unless there is proved in fact any other lawful agreement subject to the provisions of the Act, which the landlord and tenant choose to make." I find it difficult to conceive any agreement which a landlord and tenant can lawfully choose to make where the tenant is a statutory tenant, and in any event in this case I see no evidence of any such agreement. The position was this. The tenant was in occupation of rooms to which the Rent Restriction Act applied. The landlord, therefore, could not turn him out, even if he gave him a lawful notice to quit, except in accordance with the provisions of the Act. What is the position, therefore, of the landlord? He has no ground for turning the tenant out under the Act, but the circumstances are such that he is entitled under the Act to an increase of rent, and therefore he is entitled, if he can, to secure that increase of rent from his tenant. But the statute says that a landlord cannot recover any increase of rent from his tenant except in respect of a period during which, but for the Act, he would have been entitled to obtain possession, and therefore, in order to enable him to come within the provisions of that section of the statute, he has to give his tenant a notice to quit, not in any hope or belief that that will enable him to terminate the tenancy, but to enable him to say that, but for the Act, he would

(1) [1920] 3 K. B. 428, 440.

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have been in a position to turn the tenant out, and that therefore he is entitled to demand the additional statutory rent. How anyone can come to the conclusion that a landlord so acting is entering into a fresh agreement with a tenant for a continuance of his occupation under a fresh tenancy I fail to see. The landlord's position throughout is that he does not want the tenant to continue as his tenant, but the tenant is a statutory tenant, and the landlord cannot prevent his being a statutory tenant, and he only gives him the notice to quit because he wants the increased rent, and even if the landlord gets an increase of rent, the tenant is still a statutory tenant. I cannot see any materials upon which one can come to the conclusion that a fresh tenancy was created. In the absence of a fresh tenancy there could be no necessity for a fresh notice to quit. I agree that if a fresh tenancy has been created a fresh notice to quit is required, because otherwise the landlord will not be in the position indicated by the statute of a person who during the period in respect of which he has increased the rent would, but for this Act, have been entitled to possession. I do not think that the county court judge has considered the question whether or not there was between May, 1920, and the date of these proceedings any evidence upon which he could come to the conclusion, as a matter of fact, that these parties had agreed to a fresh tenancy, nor do I understand that he has considered the question whether or not the various increases of rent which this landlord demanded were justified by the Act. I think that the county court judge came to the conclusion at which he arrived entirely upon his construction of sub-s. 3 of s. 16. That sub-section must, in my opinion, have been introduced because of the decision of *Hartell* v. *Blackler* (1), but what was the intention of the Legislature in introducing it, is difficult to say. It may well be that it was introduced in order to encourage landlords to give tenants who were seeking to find other premises a further opportunity to find somewhere to go to, and in order to make it plain to landlords that by giving a reasonable

(1) [1920] 2 K. B. 161.

time to their tenants they would not be prejudicing their position in reference to recovering possession. I do not know how that may be, but I am unable to draw the conclusion that the county court judge drew—namely, that the Act allows three months' rent to be accepted after notice to quit is accepted, and that its acceptance is not to invalidate such notice, and he infers from this that if any more than three months' rent has been accepted, there is then no valid notice to quit in existence. I cannot draw that inference; and having regard to what I have already said, I cannot see any reason why that inference should be drawn, because no further notice to quit would be required unless a fresh tenancy had been created after the first notice to quit had been given. Counsel for the defendant raised a point upon the construction of s. 15, and says that his client cannot be considered, on the facts of this case, as being a statutory tenant under s. 15, and he has referred to a decision of the Court of Appeal in *Remon* v. *City of London Real Property Co.* (1) I think the opinion which I expressed in that case is opposed to counsel's argument, because I said (2): "As pointed out by Mr. Romer in his argument the Legislature in s. 5 was apparently only contemplating eviction by legal process. A person therefore who is protected by the Act from eviction by legal process from his dwelling house may not inaccurately be described as a person who by virtue of the Act retains possession of his dwelling house. The respondent being obviously a person protected by s. 5 from eviction by legal process, comes in my opinion within the description contained in s. 15, and is therefore entitled to the benefit of the Act, assuming that his premises come within the Act." Then counsel relied upon the proviso to s. 15, arguing that unless he is right in his view about the notice to quit, that proviso would never have found its place in the Act. But I cannot come to that conclusion. The proviso means simply this: that provided the landlord satisfies the conditions of the statute he will become entitled to an order of ejectment. In those circumstances it is

(1) [1921] 1 K. B. 49. (2) Ibid. 55.

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immaterial whether or not he gave a notice to quit. But in my opinion it has no bearing upon the present question whether, because of the provisions of sub-s. 3 of s. 16, any one who accepts rent after the expiration of three months from notice to quit must give a fresh notice, because by accepting the rent he has waived the previous notice.

For the reasons I have given I think that the view of the law taken by the county court judge was not the correct one. This case, however, must go back to him for two reasons, because under s. 3 of the Act of 1920 it is for the county court judge to say whether he thinks the order reasonable, even assuming he comes to the conclusion that there was a refusal to pay a lawful demand for rent, and also because the county court judge must decide whether these various increases were statutory increases within the meaning of the statute. I think the appeal must be allowed, and the case must go back to the county court judge for him to decide these matters.

SCRUTTON L.J. This case represents another stage in the development and definition of that anomalous legal entity, the statutory tenant, the person who holds the land of another contrary to the will of that other, who strongly desires to turn him out. Such a person would not ordinarily be described as a tenant.

The particular point in this case is this. A landlord claims to turn a tenant out because the tenant has not paid his rent. The rent, as claimed, is partly composed of increases upon the standard rent alleged to be authorized by the Increase of Rent Restrictions Act. It is admitted that at the time of the last increase no notice to quit was given, and it was contended that unless a notice to quit is given at the same time as the notice of increase of rent is given there can be no valid increase. The county court judge has taken that view, and has held that the plaintiff's claim for rent is not a valid claim because a separate notice to quit was not given with each notice of increase. Now in my view where there is a tenancy agreement, or a common law tenancy terminating by itself

at a fixed date, as for instance a three years' agreement terminating on a particular date, notice to quit is not necessary at all; on the expiration of the three years the tenant becomes a statutory tenant under the Act if he stays on, whether the landlord likes it or not. When, however, the agreement is a weekly tenancy which requires for its termination a notice to quit, until the notice to quit is given the tenant continues as a tenant by agreement, and the question of statutory tenancy does not arise. At common law when a notice to quit is given and disobeyed, the tenant would have to go out. Under the provisions of the Increase of Rent Restrictions Act, however, the tenant can stay in as a statutory tenant defined partly by s. 15 of the Act. Now is it necessary for the landlord to give a notice to quit in order to effect any change in a statutory tenancy? A notice to quit by itself is useless. If a landlord proposes to turn a tenant out for any of the causes sanctioned by the Act, it is no good for him to give the tenant a notice to quit; the landlord has to go to the county court judge and satisfy him that the tenant comes within some clause of the Act, and in my opinion a notice to quit in such a case would not be required, apart from the provisions of s. 15 and the proviso which provides that no notice to quit is necessary when an order is obtained from the county court judge for possession. In the same way when a tenant stays on in the premises under the Act and becomes a statutory tenant, the landlord does not want him there, but cannot get him out; the statute, however, which allows him to remain there against the will of the landlord, says that he must pay not only the standard rent but certain increases for certain specified matters. Why should a notice to quit be required to determine the statutory tenancy before the tenant can be made to pay the increase? The tenancy does not depend on the will of the landlord at all; it depends upon the terms of the statute, and if the statute justifies an increase of rent it would seem, on principle, that all the landlord has to do is to give a notice in the form of the statute of his intention to claim an increase, and then the statutory tenant continues on the terms provided by the

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statute, paying the increased rent. From that point of view it seems to me that a notice to quit is unnecessary. Supposing for instance that owing to an increase of his rent every quarter a tenant has four times during the year to increase the weekly rent of his sub-tenants, is it necessary to give four notices to quit in order to get those increases of rent? The statutory tenancy continues whether or not a notice to quit is given, and in my opinion all that is necessary is that a notice should be given by the landlord of his intention to claim the rights given him by the Act. It seems to me, therefore, that the county court judge was wrong in holding that in the case of a statutory tenancy a separate notice to quit was necessary for each increase of rent. The tenant, but for the Act, could be turned out; it is only because of the provisions of the Act that he is enabled to remain in, and consequently there is a period during which, but for the Act, the landlord would be entitled to recover possession of the premises, and in respect of that period the landlord can give a notice of increase of rent.

It follows from what I have said that, in my view, the correct view of the law was taken in *Davies* v. *Bristow* (1), and that, so far as the Rent Restriction Acts are concerned, *Hartell* v. *Blackler* (2) can be no longer relied upon as an authority. I think that *Hartell* v. *Blackler* (2), which must have been reported just before the Act of 1920 was passed, affords the explanation why s. 16, sub-s. 3, was put into the Act. The Legislature evidently did not approve of *Hartell* v. *Blackler* (2), but thinking that *Hartell* v. *Blackler* (2) was the law, they provided that at any rate for a period of three months the acceptance of rent should not prejudice the right of the landlord to possession. If, however, *Hartell* v. *Blackler* (2) is not the law, and the law is as stated in *Davies* v. *Bristow* (1), there is no reason why it should be taken that acceptance of rent after the expiration of the three months should prejudice the position and create a new tenancy.

For these reasons I think the point taken by the county court judge was erroneous and the appeal must be allowed,

(1) [1920] 3 K. B. 428. (2) [1920] 2 K. B. 161.

but obviously there are other points which it was unnecessary for him to decide having regard to the view he took of the law: the case must therefore go back to him to decide such other points as legitimately arise in the case before him.

Appeal allowed.

Solicitor for plaintiff: *Herbert A. Phillips.*
Solicitor for defendant: *S. Teff.*

R. F. S.

[IN THE COURT OF APPEAL.]

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[1919. S. 2541.]

Contract—Debt payable Abroad in Foreign Currency—Action in England to recover—Depreciation of Foreign Currency—Payment Abroad after Action brought—Discharge of Debt.

The defendant, an English lady, having in 1914 contracted in France a debt to the plaintiffs of Frs.18,035, undertook to pay that sum to them in France in French money before the end of that year. The defendant did not pay the money within the time specified, and in November, 1919, by which date the value of the French franc as expressed in English currency had heavily fallen, the plaintiffs commenced an action against her in England on a specially indorsed writ claiming the amount of sterling which would have been the equivalent of Frs.18,035 at the end of the year 1914. While the action was pending the defendant went to France and paid in French money to the then hotel manager of the plaintiffs the sum of Frs.18,035. The manager, who did not know the amount of the defendant's debt, nor that an action had been begun, did not when taking the money intend to accept it in full satisfaction, and gave the defendant a receipt as for money deposited with him. By French law interest is not payable on money due in the absence of an express agreement to pay it. The defendant then pleaded that after action brought she had satisfied the plaintiffs' claim by payment. On the question whether upon the facts above stated that plea had been established:—

Held, reversing the judgment of Avory J., that the debt, being payable in France in French currency, did not cease to be a French debt by reason of its being sued for in England, and as, if the action had been brought

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in France, the payment made would have been a good discharge of the debt notwithstanding the depreciation of the French franc as expressed in English currency since the date when the money became due, that payment must equally be a good discharge of the debt for the purposes of the English action; and that the plaintiffs were entitled to recover no more than nominal damages for the non-payment at the due date, and the costs of action down to plea pleaded.

APPEAL of the defendant from a judgment of Avory J. (1)

The defendant, Mrs. Cummings, being indebted to the plaintiffs in the year 1914 in the sum of Frs.18,035 for board and residence at the plaintiffs' hotel and for money lent, on August 3, 1914, signed an undertaking to repay the sum of Frs.18,000 to the plaintiffs at their address at Le Touquet in cash (en espèces) as soon as the European crisis permitted and in any case before the end of the year 1914. The defendant did not repay the money within the time specified, and on November 1, 1919, by which date the value of the French franc in relation to English sterling had fallen heavily, the plaintiffs sued the defendant in this country on a specially indorsed writ for the sum of Frs.18,035, claiming as its English equivalent on December 31, 1914, the date when the money should have been paid, 715*l.* 13*s.* 4*d.* The defendant on February 2, 1920, put in a defence in which she admitted the debt but contended that the English equivalent ought to be calculated as at the date when judgment should be given.

On May 9, 1920, the defendant went to Le Touquet and told the plaintiffs' manager, a M. Santini, that she owed the plaintiffs Frs.18,035, and that she had brought the money with her to pay the debt. M. Santini accepted the money, but being a new manager, he was unacquainted with the facts of the defendant's indebtedness, and as he was unable to get at the hotel books for the year 1914, which were locked up, he was unable to give her a discharge in full, but signed a receipt for the Frs.18,035, as for money deposited with him. The rates of exchange on the material dates were approximately as follows: On December 31, 1914, Frs.25 per 1*l.* sterling; on May 9, 1920, Frs.59½ per 1*l.* sterling. The defendant

(1) [1921] 3 K. B. 459.

then amended her defence by pleading that after delivery of the defence she had satisfied the plaintiffs' claim by payment of the sum of Frs.18,035.

The action came on for trial before Avory J., who found that M. Santini did not intend to accept the money as in discharge and satisfaction of the plaintiffs' claim, and held that the plaintiffs were entitled to the sum in English money, which was equivalent to Frs.18,035 at the rate of exchange existing on December 31, 1914—namely, 715*l.* 13*s.* 4*d.*—and he gave judgment for the plaintiffs for that amount less the value of the Frs.18,035 paid, calculated at the rate of exchange existing on May 9, 1920, the date of payment—namely, 59½.

The defendant appealed.

Schiller K.C. and *Giveen* for the defendant. The present case is distinguishable from all the previous cases in which the proper date for the conversion of a sum payable in foreign currency into sterling has been considered, in that the action here is not for damages for tort or breach of contract, but for debt, and debt stands on a peculiar footing. By the terms of the undertaking the defendant was to pay in France in French money a liquidated sum before a specified date No doubt she did not pay it within the time stipulated, but that default did not give rise to an action for damages. The only damages, other than nominal damages, that can in any case be recovered for the non-payment of a liquidated sum, are interest, and by the law of France interest is never payable in the absence of a special agreement to pay it. If then in November, 1919, the plaintiffs, instead of suing the defendant here, had brought an action against her in France, they would have recovered the Frs.18,035 and no more. In such an action the fact that the purchasing power of the franc had seriously diminished since the year 1914 would have been altogether irrelevant. If that be so the plaintiffs cannot by electing to sue in England instead of France enlarge the liability of the defendant and compel her to pay a sum which will be the equivalent, not of Frs.18,035, but upwards of

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Frs.36,000. The payment of the money in May, 1920, was no doubt not a complete defence to the whole of the plaintiffs' claim for it was made after action brought, but it operated as a good discharge of the debt pro tanto, and as the money so paid and the debt proved to be the same figure, it in effect discharged the whole of the original debt subject to the plaintiffs' right to proceed with the action for nominal damages and for costs. Avory J. it is true found as a fact that there was no agreement by the plaintiffs' manager to accept the money in full discharge of the plaintiffs' claim, and there was consequently no accord and satisfaction. But the only reason why the manager did not accept it in full discharge was that he knew nothing of the circumstances of the debt, and did not know what the proper amount was. Notwithstanding the judge's finding the acceptance of the money must be regarded as a satisfaction of the claim subject to the question of amount, and upon the amount turning out to be correct it must be treated in law as a full discharge of the debt. In those circumstances the right of the plaintiffs to go on for nominal damages and costs does not entitle them to reopen the liability for the original debt, or to claim to have any part of that debt converted into sterling.

[They referred to *Cash* v. *Kennion* (1); *Manners* v. *Pearson* (2); *S.S. Celia* v. *S.S. Volturno* (3); *Marburg* v. *Marburg* (4); *Scott* v. *Bevan* (5); and *Di Ferdinando* v. *Simon, Smits & Co.* (6)]

Compston K.C. and *O'Malley* for the plaintiffs. A plea of payment after action brought is indistinguishable from a plea of accord and satisfaction, and here there was no accord. Even if there had been an agreement to accept the money in full discharge it would have been bad, for the action was brought to recover, not Frs.18,035, but Frs.18,035 translated into sterling as at the date when the money ought to have been paid. And an agreement to accept a less sum, which the amount paid undoubtedly was, would have been void for want of consideration. The plaintiffs' manager

(1) (1805) 11 Ves. 314.
(2) [1898] 1 Ch. 581.
(3) [1921] 2 A. C. 544.
(4) (1866) 26 Maryland, 8.
(5) (1831) 2 B. & Ad. 78.
(6) [1920] 3 K. B. 409.

had no authority to settle an action that was already before the Court, and even if he had it is clear he had no intention to do so, for he had no knowledge that any such action had been begun. If the defendant's contention is right she will have made a substantial profit out of her own default.

Schiller K.C. in reply.

Cur. adv. vult.

Dec. 20. The following written judgments were delivered :—

BANKES L.J. In this action the respondents, who are proprietors of an hotel in France, claimed payment of a sum of Frs.18,035 for board and residence at their hotel, and for money lent. The appellant had been residing at the hotel shortly before the outbreak of war, and on August 3, 1914, she gave the respondents an undertaking in writing to repay them in cash at their hotel the amount which she acknowledged she owed them—namely, Frs.18,000—as soon as the European crisis permitted, and in any case before the end of that year. The money was not paid, and on November 1, 1919, the respondents issued a writ in this country. The claim was specially indorsed for "Frs.18,035, The English equivalent of which on December 31st, 1914, is 715*l.* 13*s.* 4*d.*" Had nothing happened between the issue of the writ and the trial the respondents would have been entitled to the equivalent in English money of the Frs.18,035 at the appropriate rate of exchange, whatever that might be. On May 9, 1920, the appellant and her husband went to the respondents' hotel, and there tendered to the respondents' representative the sum of Frs.18,035, which was accepted. Shortly afterwards a further defence of payment of the respondents' claim after action was put in. It is, I think, material to notice that the claim was for the debt only. A claim for interest had originally been added on the writ, but it had been struck out, so that the claim after the amendment of the writ, and before payment, was for the original debt, and for that only. Why the respondents had added Frs.35 to the amount inserted in the appellant's undertaking does not appear, and it is not material to consider.

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Under these circumstances the only material question for consideration is whether the plea of payment after action is established, and if established what the effect of it is. It is to be noticed that the plea does not set up that the payment was in settlement of the action, but that it was in settlement of the claim in the action. The respondents do not sue upon the appellant's undertaking, but upon the original consideration. Under these circumstances the appellant's obligation was an obligation to pay to the respondents in France. The sum to be paid was the sum of Frs.18,035. The appellant paid this amount at the place at which she had agreed to pay it, but long after the agreed date. It is not disputed that the person who received the money had the necessary authority to receive debts due to the respondents. It is not disputed that the person to whom the money was paid knew that the appellant was paying it in discharge of a debt due to the company. The respondents knew all the facts, and after the money was paid to their representative they kept it without objection or protest. Upon the question whether upon proof of these facts the plea of payment was made out, it seems to me immaterial to consider whether the person to whom the money was paid knew what the amount of the debt was, or whether or not an action had been commenced to recover it. The only ground upon which it has been urged that the plea of payment has not been proved is that payment not having been made within the agreed time the claim is really one for damages, which can only be met by proof of an accord and satisfaction, which has not been proved. Apart from the difficulty of presenting such a case in face of the indorsement on the writ, I think that it cannot prevail. The technical question whether a claim to recover a debt not paid on the due date is a claim in damages which precludes any plea of payment is one which was often referred to under the old system of pleading. In the third edition of Bullen and Leake on Pleading at p. 478 the editors say : "In the common case of a debtor paying his creditor a debt *post diem*, the defence is really one of accord and satisfaction, although from the frequent recurrence of the transaction it is looked upon

as a distinct defence under the name of payment." Unless this was so a defence of payment after action could never have been recognized. If the plea of payment is pleaded generally without limitation, it is taken as pleaded to the whole cause of action, and must show a payment in satisfaction of the damages as well as of the debt: *Randall* v. *Moon*. (1) Payment after action brought is not a complete defence unless made in satisfaction of all damages and costs of the action as well as of the debt. If it is made in respect of the debt only the plaintiff is entitled to continue the action for nominal damages, and the costs of the action: *Goodwin* v. *Cremer* (2); and see Bullen and Leake on Pleading, 3rd ed., p. 663. That payment of a debt made and accepted after the time of payment, but before action, is a complete defence, and that the creditor is not entitled to sue for nominal damages is settled by the decision in *Beaumont* v. *Greathead* (3), where Maule J. says: "The question for consideration is, whether, where a sum of money is due upon simple contract, and the creditor is entitled to claim nominal damages for its detention, the debtor is discharged by the creditor's acceptance, before action brought, of the amount of the debt, or whether the former may afterwards sue for such nominal damages. I apprehend he cannot. Nominal damages are a mere peg on which to hang costs. If a creditor were to say to his debtor, 'You owe me 50*l*. and a nominal sum for the detention thereof,' and the latter were to produce 50*l*. and tender it to the former, saying, 'Here is the amount of the debt I owe you, and the nominal damages you claim,' that, I conceive, would be a very good tender. Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity; and I think a man may very well pay 50*l*. in satisfaction and discharge of a debt of 50*l*. and of the nominal damages due for its detention." Cresswell J. said: "I am of opinion that the Lord Chief Justice was not bound to tell the jury that they must find *some* damages, and that the jury were not bound to give interest in the shape of

(1) (1852) 12 C. B. 261. (2) (1852) 18 Q. B. 757.
(3) (1846) 2 C. B. 494, 499, 500.

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damages. Payment of a smaller sum cannot be pleaded in satisfaction of a debt of larger amount; but I am not aware that the doctrine has ever been extended to the case of a claim for nominal damages after payment of the full amount of the actual debt." As the appellant has proved that she paid the amount of the debt, at the place at which, and in the currency in which, it was payable, and as the amount she paid was accepted and retained without protest or objection, I am of opinion that the plea that after action brought she satisfied the plaintiffs' claim by payment was made out, and that judgment should have been entered for the plaintiffs for nominal damages only. Costs were in the discretion of the judge who tried the case. I do not think that the appellant can expect any indulgence having regard to the fact that the payment was made without any communication with the plaintiffs' solicitors, and I consider therefore that the appellant should not have any costs of the action. The judgment will be entered for nominal damages, and the respondents will have their costs down to and including the date when the defence of payment after action was pleaded, and the appeal will be allowed with costs.

SCRUTTON L.J. This is an appeal from a judgment of Avory J. raising a curious point of fact and law. The defendant, an English lady, at the outbreak of the war owed the plaintiffs, a French hotel company, a sum of Frs.18,035, payable before the end of 1914. For reasons which have nothing to do with the present appeal she declined to pay. On November 1, 1919, the plaintiffs issued a writ against her in England claiming a sum in sterling equal to the value of Frs.18,035 on December 31, 1914. The defendant denied liability. On May 19, 1920, after defence delivered, and when the plaintiffs were represented by English solicitors, the lady, on the advice of her solicitor, and without communicating with the legal representatives of the plaintiffs, called at the hotel in France and paid a representative of the hotel company the sum of Frs.18,035 for which he gave a simple receipt, acknowledging that that sum had been received. The judge

below finds as a fact that the person giving the receipt did not know the amount of the debt, and did not intend to receive the money in satisfaction. The defendant then pleaded in the English action this payment as satisfaction of the claim by payment. Whatever the legal results of this may be, I desire to express my strong disapproval of the conduct of the defendant's solicitor in sending his client to make a payment to the French plaintiffs, who knew nothing of English law, behind the backs of their English legal representatives.

The questions are: (1.) Is such a payment, when retained by the plaintiffs, accord and satisfaction, so as to be a defence to the action? (2.) Were the plaintiffs, who received in France the amount of their debt in francs in 1920, entitled to claim in addition such a sum in English money as made up their receipts to the value of that number of francs in English money in 1914 when it was due? It appears clear that under the old pleading payment after the due date could not be pleaded as payment, but only as accord and satisfaction: "Where money is paid, not in performance of a promise, at the precise day on which it ought to have been paid, but in satisfaction of a breach of promise, there must be not only payment but acceptance in satisfaction": per Williams J. in *Chambers* v. *Miller*. (1) The reason for this is as stated in *Cook* v. *Hopewell* (2), that the claim was both for the debt and damages for non-payment, and there must be shown to be accord both as to the debt and the damages. As to accord and satisfaction, we have the authority of this Court in *Day* v. *McLea* (3), that accord and satisfaction is a question of fact. There the defendant sent a smaller sum in satisfaction of a larger debt; the plaintiffs kept the smaller sum, saying that they did so on account, and sued for the balance. It was argued that keeping the payment instead of returning it amounted in law to accord and satisfaction, but Charles J. and the Court of Appeal held that it was not a question of law but of fact, and in fact there had been no accord: see the judgment of Bowen L.J. It being a question of fact

(1) (1862) 13 C. B. (N. S.) 125, 134.
(2) (1856) 11 Ex. 555.
(3) (1889) 22 Q. B. D. 610.

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the subsequent decision of this Court in *Hirachand* v. *Temple* (1) of a question of fact does not bind us. There a third party sent a smaller sum in satisfaction of the claim; the creditor wrote back that he kept the sum on account and sued for the balance. The Court of Appeal held, reversing the judge below, that in fact there was an accord and satisfaction, and as their decision on facts does not now bind me it is not for me to question how they arrived at that decision, or how they could find, consistently with the evidence and the decision in *Day* v. *McLea* (2), that a creditor who said he kept the money on account and would and did sue for the balance had really agreed to accept it in satisfaction. I take the same view as Avory J. that there was here no accord and satisfaction, including in my consideration the fact to which he does not specifically refer, that the plaintiffs kept the money and did not return it but went on with the action. But it does not necessarily follow that the plaintiffs were therefore entitled to the sum claimed. The day before the writ was issued, if the lady had tendered in France to the plaintiffs Frs.18,035, could they have recovered more? They could not have recovered interest, for the law of France does not give it, and the debt was a French debt. In France it could not have been successfully pleaded that the French franc was of less value in English currency than it was on December 31, 1914, for the defendant was not bound to repay in English currency. But the writ was issued in England; did this increase the damages? If the writ had been issued in Germany, could the defendant have succeeded by paying the number of marks representing Frs.18,035 in 1914, though in 1921 that amount of francs represented a much larger number of marks? In *Pilkington* v. *Commissioners for Claims on France* (3), the Privy Council obiter expressed the opinion that where the French Government had confiscated assignats of the English claimants worth fifty pence in English currency, and had then agreed to make reparation, they could not do so by restoring an equal number of assignats worth twenty pence, but must

(1) [1911] 2 K. B. 330. (2) (1889) 22 Q. B. D. 610.
(3) (1821) 2 Knapp, P. C. 7.

make good the difference between the value of the assignats at different periods. In that case an English claimant desired compensation from English Courts for a wrong done to him in France, and as personal property follows the domicil it may be that he was entitled to such an amount in English money as represented the value to him in England of the property confiscated at the time of confiscation. But in this case a domiciled Frenchman desires damages for non-payment to him on the due date of a debt payable in France in French currency; can he increase the number of francs payable by saying that in one country French currency is worth less than it was at the agreed date for payment, though in other countries—e.g. Germany—it is worth more than it was at the agreed date? In my view, the plaintiffs, who were owed Frs.18,035 payable in France, must be content with Frs.18,035 paid in France. In the case of an English debt they would probably recover interest, but apparently French law which determines the incidents of a French debt excludes liability for interest. At the time of the payment the plaintiffs were in addition entitled to costs to date of payment, and, as explained in *Cook* v. *Hopewell* (1), to nominal damages. Judgment should, therefore, in my view, be entered for them for nominal damages with costs up to the time of the plea of payment of the debt. They have failed substantially since that plea, but as the difficulty has been brought about by the irregular act of the defendant in going behind the plaintiffs' legal advisers, and the defendant did not offer to submit to nominal damages but alleged accord and satisfaction in which she failed, there should be no costs of the action after payment in. The defendant must have the costs of this appeal.

ATKIN L.J. (read by BANKES L.J.). The plaintiffs in this case by specially indorsed writ dated November 1, 1919, claimed from the defendant, a married woman, the sum of 888*l.* 5*s.* 7*d.* The indorsement or statement of claim is "against the Defendant for board and residence at the

(1) 11 Ex. 555.

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Hermitage Hotel, Le Touquet Paris-Plage, and for money lent. Particulars. August 4th, 1914. To supplying board and residence to the Defendant at the above Hotel to this date, particulars, etc., 7260 francs. To money lent by the Plaintiffs to the Defendant, Frs.10,775; total Frs.18,035. The English equivalent of which on the 31st December, 1914, is 715*l.* 13*s.* 4*d.* To interest thereon at the rate of 5*l.* per cent. per annum from December 31st, 1914, 172*l.* 12*s.* 3*d.*; total 888*l.* 5*s.* 7*d.*" On November 29, 1919, the writ was amended pursuant to order dated November 27, 1919, by striking out the claim for interest. After delivery by the plaintiffs of particulars of the sums claimed for board and lodging, the defendant on February 2, 1920, delivered a defence, admitting that she was indebted to the plaintiffs in the sum of Frs.18.035, but raising an issue as to the date at which exchange should be calculated. She also counterclaimed for the loss of some of her property while at the hotel, but the counterclaim has been abandoned, and we are not concerned with it here. It is to be observed that no issue is raised as to the original debt of Frs.18,035, and no evidence was given upon this matter. The facts as stated by counsel, and apparently admitted, are that the defendant in 1914 stayed at the plaintiffs' hotel at Le Touquet, and by August 7 incurred the liability claimed of Frs.18,035 for board and lodging and money lent. Being in a difficulty in receiving funds, on August 3 she gave to the plaintiffs a written undertaking to pay to them in France in cash the sum of Frs.18,000 as soon as the European crisis should permit, and in any case before the end of 1914. It may be observed that the plaintiffs do not sue on this undertaking, but on the original consideration; the difference between Frs.18,000 and Frs.18,035 sued for is presumably for services rendered between August 3, the date of the undertaking, and August 4, the date named in the writ, or August 7, the date named in the particulars. On May 9, 1920, the defendant and her husband visited the hotel and paid to the plaintiffs' cashier there the sum of Frs.18,035 in respect of the debt due to the hotel. They were given a receipt by

the cashier, who was not himself acquainted with the circumstances of the original debt. In taking this course the defendant, as she stated in her deposition, was acting upon the advice of her solicitors. On May 17, 1920, the defendant delivered a further defence that on May 9, 1920, she had satisfied the claim by the payment of Frs.18,035. The only question in the action was whether that plea was established. The original debt was contracted in France, by an Englishwoman living in England, to a French company, payable in France in French currency. There is no evidence as to French law differing from English law as to the legal consequences of such an obligation. In France the plaintiffs could have sued the defendant only for Frs.18,035, and on payment of that sum the defendant would at any time have discharged the obligation. Inasmuch as the obligation to pay to the plaintiffs in France Frs.18,035 was a personal obligation, the plaintiffs would also have been entitled to sue the defendant in the Courts of any country where they found her, provided that the municipal law of such country recognized personal obligation contracted outside its own territory, as would be the case in most States. The plaintiffs, therefore, have the right to sue the defendant in the English Courts to recover the debt of Frs.18,035 due to them in France. Judgment would only be given in the English Courts expressed in English currency. At what date the exchange must be calculated is a matter of controversy that I need not deal with now. The action would be for a debt due in France just as, if the debt were due in England, it would be for such a debt. The legal position appears to me to be the same. If the plaintiffs had been an English company suing for an hotel bill of 1800*l.* it appears to me that, if before or after action brought the defendant paid and the plaintiffs received 1800*l.*, the debt of 1800*l.* would be satisfied and discharged; if made after action brought a plea of such payment would be a good plea, and on being admitted or proved the plaintiffs would only be entitled to judgment for costs up to the date of the plea. No doubt, technically the action for debt is for the debt and for nominal damages for breach of the promise,

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expressed or implied, to pay on the due date. To satisfy the plaintiffs' right of action once vested there must be an accord and satisfaction. But nominal damages in respect of the non-payment of a debt are a fond thing vainly invented, "a mere peg on which to hang costs": per Maule J. in *Beaumont* v. *Greathead*. (1) If a man being owed 50*l*. receives from his debtor after the due date 50*l*., what other inference can be drawn than that he receives it in satisfaction of the debt, and what other result can follow than that the debt is discharged? It was suggested in the present case, though with some distrust by the plaintiffs, that for the purposes of the English Court once a writ was issued the debt of francs payable in France became a debt of sterling at the rate of exchange of December 31, 1914, payable in England, and that such debt was not paid. Counsel disclaimed the suggestion that on December 31, 1914, the defendant incurred a liability to the plaintiffs to pay them sterling in England. If such were the effect of the transaction, it would follow that the defendant on January 1, 1915, incurred obligations to pay to the plaintiffs sums in the manifold currencies of the many countries in the world where she might eventually be sued. It appears to me that she was sued here for a French debt, and, if you please, for nominal damages, and that by paying the debt in France she discharged the debt for which she was sued in France, and in all other countries. It is not suggested that she thereby discharged herself of the obligation to pay costs; in other words, the payment was not an accord and satisfaction of the action. It seems to me that the usual results should follow: the claim is discharged, the plaintiffs are not entitled to judgment for nominal damages any more than they would be if, having a debt for 180*l*., they had received 180*l*. in satisfaction and discharge of the debt. The plaintiffs should have their costs up to the date of the plea of payment. As I think that the defendant should not have been advised to take the course she did without communication with the plaintiffs' legal advisers, especially in view of the fact that the plaintiffs

(1) 2 C. B. 494, 499.

were foreigners, I agree that the defendant should not have the costs of the action after plea.

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For the purposes of this action I have not thought it necessary to decide at what date the exchange should be calculated had the plaintiffs succeeded. The same result follows, though the exchange should be calculated as at the date when payment became due. But no case that I know of has yet decided what the position is when a foreign creditor, to whom a debt is due in his country in the currency of his country, comes to sue his debtor in the Courts of this country for the foreign debt. Much may be said for the proposition that the debtor's obligation is to pay, say, francs, and so continues until the debt is merged in the judgment which should give him the English equivalent at that date of those francs. It is a problem which seems to require very full consideration, and which I personally should desire to reserve.

Appeal allowed.

Solicitors for the defendant: *Cohen & Cohen.*
Solicitors for the plaintiffs: *Hutchison & Cuff.*

J. F. C.

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Oct. 10, 11;
Nov. 22.

In re UNEMPLOYMENT INSURANCE ACT, 1920.

In re APPLICATIONS BY J. S. VELLACOTT AND OTHERS.

Insurance (Unemployment)—Employed Persons—Excepted Employments—"Employment in agriculture"—Golf Greenkeeper—Driver of Farmer's Motor Lorry—"Employment in domestic service"—Hunt Servants—Private Secretary—Stoker—Painter—Museum Attendant—Hospital Porter—Lodgekeeper—Gamekeeper—River Keeper—School Cobbler—Greyhound Trainer—Dairymaid—Unemployment Insurance Act, 1920 (10 & 11 *Geo.* 5, *c.* 30), *s.* 1, *Sch. I., Part II.* (*a*), (*b*).

By s. 1 of the Unemployment Insurance Act, 1920, persons engaged in the employments specified in Sch. I., Part II., of the Act, are excepted from the provisions of the Act as to insurance against unemployment. Sch. I., Part II., includes amongst such persons those engaged in (*a*) employment in agriculture, including horticulture, and (*b*) employment in domestic service:—

Held, that a golf greenkeeper, as being a gardener engaged in horticulture, and a dairymaid, were persons engaged in employment in agriculture, but that the driver of a farmer's motor lorry taking farm produce to market and bringing back manure was not.

Held, further, that the following were engaged in employment in domestic service: A huntsman of a pack of foxhounds and the whippers-in and kennelman, a stoker employed exclusively at a large college to light and stoke the fires of an engine driving a dynamo supplying light and heat to the college, a museum attendant, a hospital porter, a lodgekeeper, a gamekeeper, a river keeper under a private employer, a trainer of greyhounds in private employment, and a dairymaid (as well as in agriculture); but that the following were not so engaged: a private secretary, a painter employed exclusively by a large college, and a cobbler employed exclusively by a school to mend the boots of the inmates.

Observations by Roche J. in the *Junior Carlton Club Case* (ante, pp. 166, 170) explained.

HEARING by Roche J. of cases referred for decision to the High Court by the Minister of Labour under s. 10, sub-s. 1, proviso (ii.), of the Unemployment Insurance Act, 1920 (10 & 11 Geo. 5, c. 30).

The following eighteen cases were dealt with in the following order:—

William Orvis (huntsman), Robert Dale (first whip), William Knight (second whip) and George Gaiger (kennelman), employed by Mr. Anthony C. Bovill, master of foxhounds.

Walter Geary (river keeper), employed by Major McClintock.

Thomas Amos (trainer of greyhounds) and George Stewart (gamekeeper), employed by the Rev. C. H. Brocklebank.

David Ainslie (greenkeeper), employed by St. Anne's Old Links Golf Club.

A. V. Wright (driver of farmer's motor lorry), employed by Mr. J. S. Vellacott.

Stanley Gardner (museum attendant), employed by Professor Hogarth at the Ashmolean Museum.

Mr. Ernest Head (private secretary), employed by Mr. R. F. Fuller.

Bernard Mizen (hospital porter), employed by the Kensington and Fulham Hospital.

Arthur Lovell (stores porter) and Samuel Vickery (lodge-keeper), employed by the Bristol Mental Hospital.

Henry J. Freeman (painter) and William Dennison (stoker), employed by the Royal Holloway College.

Herbert Sutcliffe (school cobbler), employed by the Crossley and Porter Orphan Home and School.

Millicent Nellie Blackman (dairymaid), employed by the Hon. John Jacob Astor.

The questions raised were whether the above employees were respectively engaged in employment in agriculture or employment in domestic service, which employments, by s. 1 and Part II. (*a*) and (*b*) of Sch. I. to the Unemployment Insurance Act, 1920, are exempt from the provisions for insurance against unemployment contained in the Act.

Counsel for the employer was heard in the first four cases only—namely, those of William Orvis, Robert Dale, William Knight and George Gaiger, employed by Mr. A. C. Bovill.

For the sake of convenience the material facts in each case are set forth in the respective arguments.

Cecil W. Lilley and *J. S. P. Mellor* for the Ministry of Labour. By s. 1 of the Unemployment Insurance Act, 1920, persons engaged in employments specified in Part I. of Sch. I., not being employments specified in Part II., are to be insured against unemployment. The cases to be dealt with raise the question whether the employees therein specified

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are exempt as being engaged either in "Employment in agriculture, including horticulture . . . . " within the meaning of Part II. (*a*) of Sch. I., or in "Employment in domestic service . . . . " within Part II. (*b*). The first cases are those of Orvis, huntsman, Dale and Knight, first and second whips, and Gaiger, kennelman, in connection with the Hampshire Hunt. It is contended that they are not employed in domestic service.

Warwick Draper for the master of the hunt. This pack is not one of those maintained by a great landowner nor is it hunted by a committee. There is an association of landowners, the hunt club, who have a house in which the master for the year generally lives; he is unpaid. They pay a subscription to the fund out of which the employees, including these four men, are paid. The men are engaged by the master on his own responsibility when he is elected on May 1, and formally discharged by him at the end of his year, being reappointed by him or the succeeding master on the following May 1. The huntsman superintends the health and feeding of the hounds and is responsible for the sport in the field, and the whippers-in work under him. The kennelman prepares the hounds' food and cleans the kennels. These men are employed in domestic service within Sch. I., Part II. (*b*), of the Act. The alteration of the general form of association for hunting purposes makes no difference; the essentials of hunting are the same as they always were, and these men are as much the master's servants as they would be in the case of a private hunt. It is not necessary that they should reside in what may be called his establishment: see *Nicoll* v. *Greaves*. (1) Part II. (*i*) of Sch. I. of the Act does not apply, because these men were not "engaged or paid through a club."

Lilley then dealt with the other cases. In the case of Geary, employed as river keeper, the fishing was strictly preserved for the employer's enjoyment, and Geary looked after it. It is said that sport has always been one of the needs of Englishmen, and that therefore Geary was one of

(1) (1864) 17 C. B. (N. S.) 27.

those "about their employers' persons, or establishments, residential or quasi-residential, for the purpose of ministering to their employers' needs or wants": per Roche J. in the *Junior Carlton Club Case.* (1) But it is the nature of the work which must be looked at—s. 47, sub-s. 2—and if he had been employed by a club it could not be said that Geary in looking after the water would be looking after the needs and wants of the members. It is true that a servants' licence was taken out annually in respect of this man; but that makes no difference.

Within the same principles are Amos, employed as a keeper of greyhounds, and Stewart, a gamekeeper.

David Ainslie was employed as greenkeeper by a golf club, and it may be that he is exempt under Part II. (*a*) of Sch. I., as being employed "in agriculture, including horticulture"—namely, as a gardener, tending the grass.

In the case of Wright, employed by one Vellacott, a farmer in Essex, the employment was to drive a motor lorry carrying the produce of the farm to Covent Garden, sometimes bringing back town manure for use on the farm. Vellacott had a stall at Covent Garden where the produce was sold, and Wright helped to load at the farm and unload the manure; but did not unload at Covent Garden. In *Smithers* v. *Wallis* (2) Collins M.R. said (3): "It is obviously as much a necessary part of the work of a person employed in agriculture to carry the farm produce or stock to market as it is to work on the farm." But in that case the employee was mainly employed about the farm in agriculture: see *Smith* v. *Coles.* (4) It may be that this lorry was engaged in an agricultural purpose: see *Hoddell* v. *Parker* (5) and *London County Council* v. *Lee* (6); but Wright was not employed in agriculture. Carrying produce to market is no part of the processes of agriculture. His is a mechanical employment—if he left he would seek employment as a motor driver,

(1) Ante, pp. 166, 170.
(2) [1903] 1 K. B. 200; 72 L. J. (K. B.) 57.
(3) 72 L. J. (K. B.) 57, 59.
(4) [1905] 2 K. B. 827.
(5) [1910] 2 K. B. 323.
(6) [1914] 3 K. B. 255.

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not as a farm labourer. No doubt his employer was an agriculturist; but it does not follow that the employment of all his servants was "employment in agriculture." Sect. 47, sub-s. 2, of the Act provides that regard shall be had to the nature of the work on which the employee is engaged rather than to the business of the person by whom he is employed, which shows that employment by an employer of servants not in his business was contemplated. In *Hampton* v. *Winward* (1) women employed part time on a farm in milking were not "workmen in agriculture" within s. 4, sub-s. 1, of the Corn Production Act, 1917 (7 & 8 Geo. 5, c. 46).

[*Meally* v. *M'Gowan* (2) was also referred to.]

Gardner is employed by Professor Hogarth, the keeper, as an attendant at the Ashmolean Museum, he being paid out of University funds. He dusts the cases, cleans the carpets, etc., and keeps an eye on visitors. He seems rather outside the scope of domestic service, though the case might be different in the case of a small private museum.

In the case of Mr. Head, who was employed as private secretary, he could never be described as a domestic servant. He has nothing to do with the staff except perhaps as the agent of his employer. No doubt he would be part of the latter's retinue; but he does not minister to his "needs or wants" in the sense intended by Roche J. in the *Junior Carlton Club Case.* (3)

The case of Mizen, the hospital porter, seems to be on the same footing as that of Gardner, the attendant at the Ashmolean Museum above mentioned.

Lovell, the stores porter, and Vickery, the lodgekeeper, would seem to be exempt as employed in domestic service.

The cases of Freeman and Dennison present greater difficulties. Freeman is employed as a painter in the Royal Holloway College for Women, which contains some 800 rooms and halls, to do painting and repairing. He resides outside the college, but is a member of the staff. He is really a craftsman, not a domestic servant; it is only the size of the

(1) [1921] 2 K. B. 669. (2) (1902) 4 F. 883.
(3) Ante, pp. 166, 170.

college that enables the authorities to employ him exclusively instead of employing craftsmen from outside when required. He does not minister to any personal needs or wants. Dennison is a stoker at the same college. There is an engine driving a dynamo, an engineer, two assistants and two stokers. The engineer is obviously not a domestic servant, but it has been suggested that his stoker is. The stoker looks after the heating and lighting; he does nothing else, and is not a "handy man" about the college.

[ROCHE J. Is he not a specialised form of kitchen maid? It makes no difference that things are done on a large scale.]

He is more of an engineer; if he left he would not enter domestic service but would seek employment at, e.g., a gasworks.

Again Sutcliffe, employed exclusively by the orphan home to repair the boots of the inmates, is, for the above reasons, a craftsman, and insurable, although he is paid weekly wages and is subject to one week's notice. It is contended that he is employed as a journeyman by the home in their capacity as boot repairers.

Millicent Nellie Blackman is a dairymaid. She brings cows in from pasture, prepares their food and feeds and milks them, and cleans the milk pails in the usual way. She is not employed in agriculture, but in an employment ancillary to agriculture, and is therefore insurable.

ROCHE J. These eighteen cases which have been referred to me by the Minister of Labour under the provisions of the Unemployment Insurance Act, 1920, raise questions as to the nature of the employment of various classes of persons. The first four cases, those of Orvis, Dale, Knight and Gaiger, raise the question whether hunt servants are domestic servants within the meaning of the exception of "employment in domestic service" in Sch. I., Part II. (*b*). In the case of the *Junior Carlton Club* (1) I dealt with the meaning I attached to these words, and I now refer to my observations

(1) Ante, p. 166.

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therein. These four cases, in my judgment, fall within the description or rule I there laid down.

It has been proved to me that the hunt servants in question—namely, the huntsman, the whips and the kennelman—are the servants of the master of the hounds, notwithstanding that in accordance with the very common practice of the present day the hunt is maintained by the subscriptions of the members of the hunt, and not by some great landed proprietor. Circumstances and economic circumstances have changed, but the essentials of foxhunting remain the same, and one of those is that there shall be some one in command. The person in command is the master. He has the absolute power of engaging and dismissing the subordinates who, under him, contribute to the success of the hunt and the maintenance of the hounds. The status of hunt servants was debated and decided in 1864 in the case of *Nicoll* v. *Greaves*. (1) The question there was as to the category into which a huntsman was to be placed and as to the notice he was entitled to receive, and it was held that a huntsman was a servant, a menial servant, menial not being used in any derogatory sense, but merely indicating a person who was part of the retinue of another. I am of opinion that the huntsman is a domestic servant of the master within the meaning of this Act. He is a person engaged about his employer's person and establishment for the purpose of ministering to the needs or wants of his employer and of the persons associated with that establishment, the members of the hunt. Whether at the present day it would be held in accordance with the decision in *Nicoll* v. *Greaves* (1) that the custom as to notice is the same now as then, I express no opinion, though I have considerable doubt whether it would. But that makes no difference to the value of that decision that a huntsman is a servant and is a servant of the master. My decision is to the same effect, and in so deciding I hold that a huntsman and hunt servants generally are employed "in domestic service" within the meaning of Sch. I., Part II. (*b*), of the Act of 1920,

(1) 17 C. B. (N. S.) 27.

and consequently exempt from the obligation to pay contributions for insurance and not entitled to the benefits under the Act.

The same principles apply to the other cases. The case of Geary is that of a river keeper. I hold that he is a domestic servant. He is engaged by a private employer for the purpose of looking after the fishing, which is one of the interests and amusements in life of his employer. Sport has universally been held to be one of the wants and needs of the average ordinary Englishman.

The cases of Amos and Stewart are in respect of the employments of a greyhound keeper and a gamekeeper. The same principles apply as in the case of the hunt servants, and I hold that these also are domestic servants.

With regard to the case of Ainsley, employed as greenkeeper to a golf club, I think he falls within another section of the Act—namely, Sch. I., Part II. (*a*)—and is "employed in . . . . horticulture." The green keeper is a man who looks after the grass, its growth and its keeping in check and control, and although employed by the golf club he is really a gardener; a very specialised gardener, but no less a gardener than the man who may be keeping in order the lawns in great gardens such as Kew. It is therefore unnecessary for me to decide whether the green keeper is within the exception of domestic service.

In the case of Wright the employer, Mr. Vellacott, a farmer and market gardener, employs him as driver of motor lorries in which the produce of the farm is taken to Covent Garden, and manurial products necessary to the farm are brought back from London.

It is obvious that in many cases a man who drives carts to and from a farm may do other matters independent of or in connection with his driving, by reason of which he may be said to be employed in agriculture. This may also be true, although the motive power which draws or propels the cart is not a horse but a motor. On the other hand in connection with the farm and subsidiary thereto there may be employed drivers of horse vehicles

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and drivers of motor vehicles who cannot properly be said to be employed in agriculture, but are properly said to be employed in another craft or trade by agriculturists, and that distinction is the very distinction which, in my opinion, is met by s. 47, sub-s. 2, of the Act, which enacts that "regard shall be had to the nature of the work on which [the employed person] is or was engaged rather than to the business of the person by whom he is or was employed." I am of opinion that Wright was not engaged mainly in agriculture, or sufficiently engaged in agriculture for it to be truly said of him that he was employed in agriculture. In my opinion he was employed in lorry driving, which was accidentally rather than essentially connected with agriculture. Therefore he is insurable.

The next case is that of one Gardner, engaged by Professor Hogarth as an attendant at the Ashmolean Museum, Oxford. This, like most of the cases that come before me, is a border-line case, but on the whole I am of opinion that Gardner was employed in domestic service. It is quite true that the University of Oxford carries on its functions in different buildings and establishments, but in *In re David* (the *Rugby School Case* (1)) I held that the staff room cleaner was a domestic servant, and I do not think that any distinction ought to be made between a person who only cleans the floors or cleans the building and a person who, like Gardner, in addition to certain duties as a cleaner, watches visitors to the museum to see that they do no harm.

In the next case Mr. Fuller, a large landowner, employs a Mr. Head as his private secretary at a salary of less than 250*l.* a year. In my opinion Mr. Head is not a domestic servant and is insurable. I again refer to my decision in the *Junior Carlton Club Case* (2) for the purpose of explaining, if explanation be necessary, that when I said (3) that domestic servants are "servants, whose main or general function it is to be about their employers' persons, or establishments, residential or quasi-residential, for the purpose of

(1) Ante, p. 172.

(2) Ante, p. 166.

(3) Ibid. 170.

ministering to their employers' needs or wants, or to the needs or wants of those who are members of such establishments, or of those resorting to such establishments, including guests," I intended to confine the words "needs or wants" to what may be called the personal or ordinary needs or wants of the employer. These include the provision of what is necessary for the comfort, even the luxury and amusement of the establishment, upon the estate which forms part of the establishment, or in the gardens which form part of the establishment of the employer; but, in my judgment, it does not include the transaction of the business of the employer, not being domestic business, any more than it includes the education of the employer's children. These latter are needs or wants which cannot be described as domestic, and accordingly I hold that persons employed in such capacities as these, of which that of private secretary is one, are not employed in domestic service.

The cases of Mizen, Vickery and Lovell come next. Mizen was employed as a hospital porter at a hospital, and Vickery as a storekeeper and Lovell as a lodgekeeper at the Bristol Mental Hospital. All three seem to me to be employed in domestic service, for the occupations of storekeeper and lodgekeeper are domestic in nature.

The case of Freeman, employed in the Royal Holloway College as a painter and decorator, seems to me to fall on the other side of the line and to be within s. 47, sub-s. 2, of the Act. This is not the case of a large establishment specialising its domestic servants to a high degree. It is rather a case where by reason of the large establishment and the scale on which it is conducted, the establishment itself is doing what a private establishment ordinarily does not do, that is, outside contractors' and tradesmen's work. I regard Freeman as a craftsman, pure and simple, and not as a domestic servant, and the college as the employer of a craftsman.

The case of Dennison, employed by the same college as a stoker, has given me a great deal of trouble. I am not going to decide any other case of employment as a stoker except this one. It may be that there are cases where persons

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employed as stokers would fall into the class of craftsmen as in the last case of Freeman. On the whole I am of opinion that Dennison is engaged in domestic service. Warming and heating the house and firing the boiler or lighting the fires where necessary for that purpose is now a well-known form of domestic service, and therefore, though with some doubt, I think that Dennison is merely a rather highly specialised representative of that form of domestic service.

The next case, that of Sutcliffe, employed by the orphan home for the repair of the boots of the inmates of the home, falls on the other side—namely, into the category of craftsman. He is employed as a journeyman boot repairer upon premises where his employers have also a domestic staff. Sutcliffe, in my judgment, is not engaged in domestic service.

In the next case a young woman called Blackman was employed in a large establishment as dairymaid. She is not insurable for a twofold reason. In my judgment she is employed in agriculture, and is therefore exempt under Sch. I., Part II. (*a*), of the Act, and she is also employed in domestic service. It would be true to say that she is employed on the domestic side of agriculture and on the agricultural side of domestic service. It is one of those cases which lie between the two employments, but is included in both of the categories. For this reason I think that Miss Blackman is not insurable, as being engaged in an excepted employment.

Judgment accordingly.

Solicitor for the Minister of Labour: *The Solicitor to the Ministry of Labour.*

Solicitors for the Master of the Hunt: *Vandercom & Co.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A. 1921 Dec 2.

ABRAHAMS AND ANOTHER *v.* HERBERT REIACH, LIMITED.

Contract—Author and Publisher—Contract to publish—Discretion of Publisher—Breach of Contract—Measure of Damages.

A firm of publishers agreed with the authors of a series of articles to print and publish the articles, first in a magazine on certain terms, and after that in the form of a book on the terms of paying the authors 4*d.* for every copy of the book sold. The form and price of the book, the number of copies to be printed, and the date of the publication were left to the discretion of the publishers. They printed and published the articles in the magazine upon the agreed terms, but refused to print or publish them in the form of a book.

In an action by the authors for damages for breach of the contract:—

Held, that the defendants could not limit the damages to 4*d.* a copy upon the smallest number of copies that could be described as a publication of the book; but that they were bound to publish such a number as was reasonable in all the circumstances, and that the damages were to be measured by the amount the plaintiffs lost through the defendants' refusal to do this.

APPEAL from the judgment of Sankey J. in an action tried before the learned judge without a jury.

In April, 1919, the defendants, who were printers and publishers of a magazine called the Badminton Magazine, agreed with the plaintiffs to print and publish in the Badminton Magazine a series of articles on Training for Athletics written by the plaintiffs with photographic illustrations, and, on completion of the publication of the articles in the Badminton Magazine, to publish the same also as a book, and to pay the plaintiffs therefor at the rate of 1*l.* per 1000 words in respect of the publication in the Badminton Magazine and a royalty of 4*d.* a copy on each book sold.

The defendants printed and published the articles in the Badminton Magazine, but refused to publish them as a book. The plaintiffs were two celebrated athletes one of whom had run for Oxford University and the other for Cambridge. They were also members of the medical profession. They claimed damages for the loss of the benefit of the publicity

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they would have secured by the publication of the book and for the loss of a favourable opportunity for selling the book, the Olympic Games having been fixed to take place in August, 1920, at Antwerp. The learned judge held that they had suffered no loss under these heads.

The plaintiffs also claimed for the loss of the royalties they would have received but for the defendants' breach of contract. The defendants paid 25*l.* into Court with a denial of liability. On this head Sankey J. awarded the plaintiffs 500*l.* damages.

The defendants appealed on the ground that these damages were excessive.

Jowitt for the appellants. The damages are excessive. The obligation of a publisher who contracts to publish, and no more, is not an onerous one. He need not publish more than one edition. The relation between the author and publisher is that of a partnership at will: *Reade* v. *Bentley* (1); *Warne* v. *Routledge* (2); and either party may on reasonable notice retire from the joint adventure. By this contract a very wide discretion is allowed to the appellants. The number of copies to be printed and published, the form of the book, the date of publication and the price of each copy are all left to their judgment. Accordingly they would perform their obligation by offering to the public the smallest number of copies that could be called an edition or a publication of the book. The amount paid into Court represents a sale of 1500 copies. No one could deny that an offer of 1500 copies would constitute a publication of the book within the meaning of this contract. If a defendant may perform his obligations in either of two ways the plaintiff can only claim for a breach of that stipulation which is less profitable to himself and less onerous to the defendant: *Cockburn* v. *Alexander* (3), per Maule J.; *Robinson* v. *Robinson* (4), per Lord Cranworth L.J.; *Deverill* v. *Burnell* (5), per Bovill C.J.; *Thornett* v. *Yuills.* (6)

(1) (1857) 3 K. & J. 271; (1858) 4 K. & J. 656.
(2) (1874) L. R. 18 Eq. 497.
(3) (1848) 6 C. B. 791, 814.
(4) (1851) 1 D. M. & G. 247, 257.
(5) (1873) L. R. 8 C. P. 475, 481.
(6) [1921] 1 K. B. 219; 26 Com. Cas. 59.

[*Maw* v. *Jones* (1) and *Baker* v. *Denkera Ashanti Mining Corporation* (2) were also cited.]

H. G. Robertson for the respondents. This contract does not impose alternative obligations upon the appellants. There is only one obligation—namely, to publish the book. It may be difficult to define that obligation, but it is still one obligation, although its bounds may be vague or obscure. If it be granted for the sake of argument that an issue of 1500 copies would be a publication within the meaning of this contract, it must follow that an issue of 30,000 would be a publication; but that does not convert the contract into an obligation to issue 1500 or 30,000 copies at the option of the publishers. It may be that if the respondents alleged an obligation to issue 30,000 copies they would fail to establish that obligation; but that does not conclude this case, because the obligation of the appellants is not to issue this or that specific number of copies, but is to effect a reasonable publication of the book. The question the Court has to determine is, how much have the respondents lost by the appellants' refusal to make such a publication of this book as would have been reasonable in all the circumstances? That is the question which Sankey J. put to himself, and this Court will not readily interfere with the learned judge's conclusion in any case, and still less in relief of wrongdoers who have arbitrarily broken their contract.

Jowitt in reply. The respondents might have engaged the services of another publisher, and by so doing decreased the damages.

BANKES L.J. This appeal really concerns the amount of the damages. The action was brought for breach of the appellants' contract to publish in the form of a book certain articles which the respondents had written. The learned judge held that the contract as alleged in the statement of claim was proved. That being so, *Reade* v. *Bentley* (3) lays down a rule of construction which is applicable; a publisher

(1) (1890) 25 Q. B. D. 107. (2) (1903) 20 Times L. R. 37.
(3) 4 K. & J. 656.

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Bankes L.J.

who has agreed to publish a work must publish it, but is not bound to continue publishing it; the author has a right to determine the agreement after publication of an edition unless the agreement otherwise provides. The appellants undertook to publish this book and repudiated their agreement. What are the damages to which the respondents are prima facie entitled? The general rule is that stated by Parke B. in *Robinson* v. *Harman* (1): "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." Mr. Jowitt contended that this was one of those contracts which may be performed in one of several ways and was analogous to those contracts which provide for alternative methods of performance. If this were so the party complaining of a breach must be content to have the damages assessed by the standard which is the least onerous to the defendant. But in my opinion this is not a contract of that kind. In the cases to which we have been referred the contracts provide on the face of them for alternative methods of performance. This contract only imposes one obligation upon the appellants—namely, to publish. The question is what will satisfy that obligation? The appellants have a wide discretion; the time of publication, the number of copies to be printed, the price at which they are to be offered, and the form the book is to take are all left to their judgment. That however does not dispose of the case, because they have repudiated their obligation altogether, and the difficult question we have to decide is in what position the respondents would have stood if the appellants had performed their obligation. To answer this question the Court must come to some conclusion on matters on which there is no evidence; how the appellants would have exercised their discretion; what number of copies they would have published; how many editions would be reasonable. On all these points the parties left the learned judge in a difficult position. The case is very bare of materials from

(1) (1848) 1 Ex. 850, 855.

which he could draw any conclusion. He rightly emphasized the points which would induce a reasonable expectation of a large sale; the fact that the type was already set up and that the cost of production would be small; the character and reputation of the respondents, and the opportune occasion for publishing the book. But there were other matters to be taken into account, and in my opinion the learned judge made an estimate which was too favourable to the respondents and we cannot allow the judgment for 500*l.* to stand. The parties have agreed that we may substitute an amount which we think fair, and I think 100*l.* would be a fair assessment. The judgment will stand for that amount.

SCRUTTON L.J. I agree. The respondents are two distinguished athletes. They wrote certain articles on training for athletics and illustrated them with photographs and published them in the appellants' magazine. The appellant agreed to publish the articles in the form of a book. I cannot but wonder that publishers and authors enter into agreements as indefinite as this. It is so vague and general in its terms that it is hard to say what it means. It contemplates a book being published and copies of it being sold; but nothing is said about the number of copies to be printed, nothing about the price at which they are to be sold, or the time of publication. Mr. Jowitt contended that if one copy was published that would satisfy the appellant's obligation. That cannot be laid down as a proposition of law. I think the appellants were bound to make such a publication as could be considered reasonable in the circumstances. Having done that they are not bound to do anything further. Provided that they make a reasonable publication the number and price of the copies are left to them. They broke their contract, and now what is the measure of damages? There are two principles which may seem to clash. One of these is stated by Lord Selborne in *Wilson* v. *Northampton and Banbury Junction Ry. Co.* (1): "In the case of damages, as it appears

(1) (1874) L. R. 9 Ch. 279, 285.

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Scrutton L.J.

to me, the plaintiff will be entitled to the benefit of such presumptions as, according to the rules of law, are made in Courts both of law and equity against persons who are wrongdoers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim, that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the bona fide performance of the agreement." I am not inclined to be strict in limiting the damages recoverable against wrongdoers, but if their obligation is left so much to their discretion that there are several ways of performing it, I have always understood that the Court assesses damages on the basis that "if the contract could have been performed by the performance of the alternative least beneficial to the plaintiff, the measure of damages would be regulated by the loss occasioned by non-performance of that alternative": *Deverill* v. *Burnell* (1), per Bovill C.J. The simple reason for this is that a defendant is not liable in damages for not doing that which he is not bound to do. In assessing the damages in this case I try first to ascertain what edition of the book would have been a performance of this contract; I do not forget that the respondents cannot recover more than they would have suffered if they themselves acted reasonably; I bear in mind also that the appellants are wrongdoers; and acting on these lines I do not dissent from an assessment of 100*l.*, though I think myself the plaintiffs might have got considerably less.

ATKIN L.J. I agree in the result, though I do not go all the way with Scrutton L.J. The contract was to publish a book with illustrations and to pay the authors 4*d.* for every copy sold. The book would no doubt be published for the benefit of the publishers, and the authors would have an interest in the nature of a royalty in the sale of the book. The transaction resembles an agreement for a joint adventure falling short however of a partnership. There having been

(1) L. R. 8 C. P. 475, 481.

a breach of this contract the Court, in order to place the parties in the same pecuniary position as if the contract had been kept, must first ascertain what the contract was. If a merchant makes a contract to deliver goods to a shipowner to be carried by him for reward, and the merchant fails to provide the goods, the Court must first find what is the contract which has been broken; and if it was to carry the goods to one of two alternative ports at different distances from the port of loading at rates of freight differing according to the distance, the only contract on which the shipowner can sue is a contract for carriage to the nearer port. The plaintiff cannot prove a contract for performance of the more onerous obligation. This explains why in cases of this kind the Court regards only the lesser of two alternative obligations. But in the present case there are no alternatives, and to adjust the rights of the parties the only method is to form a reasonable estimate of the amount the respondents would be in pocket if the appellant had kept his promise. Everything likely to affect the amount of the profit must be considered; the nature and popularity of the subject matter, the reputation of the authors, the cost of producing a book on that subject, the price at which it would command a sale, the business capacity of the publishers and the chances of earning a profit by the sale of the book. On the other hand the publishers are not bound to run risks contrary to their judgment; they would naturally and properly allow for fluctuation in the public taste for literature of this kind. An analogous calculation has to be made when a man having engaged to take another into his service for a time and to pay him a share in the profit of his business, refuses to employ him at all. In assessing the damages for the breach of this contract the question is not how the employer could carry on his business so as to make the least possible profit and so involve himself in the least possible obligation towards the plaintiff. Apart from his contract, he need not carry on business at all. The proper method of assessment is quite different; it is to make a reasonable computation of the amount the respondents would have received had the

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contract been fulfilled. The sum so arrived at is the measure of their damages. This seems to have been the method pursued by Sankey J., but in my view the actual result at which he arrived is too favourable to the respondents, and the learned judge must have omitted some considerations which ought to have been taken into account. To produce 500*l.* damages there must have been a sale of 30,000 copies of the book, and that is too large an estimate. The evidence warrants the inference that there would have been a substantial sale; but the book may still be published, though perhaps under less advantageous conditions; and the sale may still be large. Moreover the publishers might have exercised their discretion upon a mistaken view of their own interests and have published less copies than they could without difficulty have sold. On the whole I agree that 100*l.* is a fair assessment of the damages.

Appeal allowed.

Solicitor for appellants: *L. F. Callingham.*

Solicitors for respondents: *Crossman, Block, Matthews & Crossman, for Wade-Gery & Brackenbury, St. Neots.*

W. H. G.

Dictum of LUSH, J., at p. 489, *approved.* MCTAGGART *v.* MCTAGGART. [1948] 2 All E.R. 754.

LA ROCHE *v.* ARMSTRONG.

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Jan. 19.

[1920. L. 1489.]

Evidence—Letters without Prejudice—Negotiations for Settlement of Dispute—Privilege—Solicitor and Client—Admissions—Implied Trust—Derivative Interest—Solicitors' Duties.

In a dispute between two parties, letters and negotiations between their respective solicitors, which are written or declared to be without prejudice, are inadmissible in evidence not only against the parties themselves but also against the solicitors.

In an action by A against B, in which the title to a chattel is in question, admissions by a person previously entitled which were made during the continuance of his or her interest, and which qualify or affect the title, may be given in evidence against B; but such evidence is not admissible where no question of title arises and where the question at issue is merely the right to a sum of money :—

Semble, a solicitor who receives from his client for the purpose of his or her defence a sum of money which A alleges was trust money in the client's hands is under no duty to preserve the money as such trust money or to refuse to apply it in accordance with the client's directions.

ACTION tried before Lush J.

The plaintiff in this action sued as administrator of the estate of his son Godfried La Roche, who died at Winnebek in British West Africa on March 23, 1920.

The facts as set out in the statement of claim were as follows : For some time before his death, Godfried La Roche was engaged to marry one Margaret Barbour, and in March, 1920, he sent to her in London from West Africa two drafts for 100*l.* each. On March 28, 1920, Miss La Roche, the sister of the deceased, told Miss Barbour of her brother's death. In May, 1920, the plaintiff, acting as his son's administrator, demanded from Miss Barbour the proceeds of the above drafts, upon the ground that they were sent her by the deceased for the purpose of procuring and furnishing on his behalf a flat for their joint occupation after their marriage upon his return from West Africa, and that the drafts remained the property of the deceased until his death, and thereafter became part of his estate, to be held in trust for and/or as money received for the use of the administrator of his estate.

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Miss Barbour refused to hand over the proceeds of the drafts to the plaintiff, and on July 24, 1920, she handed to the defendant 115*l.*, which was a portion of the proceeds. The plaintiff alleged that this money was received by the defendant with notice of the foregoing facts or that these facts came to his notice before the issue of the writ in this action on July 27, 1920, and that it was therefore his duty to hand over this sum of 115*l.* to the plaintiff as administrator of his son's estate.

The defendant in his defence gave a general denial to these statements, and also pleaded that he was at all material times Miss Barbour's solicitor and acted professionally for her. In a letter dated May 3, 1920, Miss Barbour wrote to the plaintiff, refusing to hand over the proceeds of the drafts, on the ground that they were given to her by the deceased for her own personal use. On June 7, 1920, the plaintiff's solicitor, Mr. Patteson, wrote to Miss Barbour a letter, referring to her letter of May 31 and concluding: "Unless the money is paid to me by Wednesday next, proceedings will be taken against you for the recovery of the amount." Miss Barbour instructed the defendant to act for her, and he wrote on her behalf to the plaintiff's solicitor two letters, both marked "without prejudice," with a view to the settlement of the dispute. It was agreed by counsel that the judge should provisionally read the letters in order to assist him in deciding whether the statements in them could be used in evidence against the writer. The first was dated July 19, 1920, and in it the defendant stated that Miss Barbour would pay over "the balance of the 200*l.* which she received from the deceased: and that the balance now in her hands is 115*l.*" The second was dated July 24, 1920, and in it the defendant wrote: "I have seen my client again to-day, and she has handed over to me the 115*l.* She informs me that this is all she has, and if you like to take this sum you can have it. If you do not take it, I propose to return it to her, and I am instructed to accept service of the writ if your client decides to issue it."

Counsel for the plaintiff, after opening his case, proposed to put these letters in evidence in order to establish that

the sum of 115*l.*, part of the proceeds of the two drafts, came into the defendant's hands.

Counsel for the defendant took the objection that the letters, being written without prejudice, must be excluded.

Evidence of an interview between the plaintiff's solicitor and the defendant in consequence of the above letters, at which terms of settlement were discussed, was also objected to on the same ground.

[*Walter Hedley* for the plaintiff. These letters were written with a view to avoiding litigation between the plaintiff and Miss Barbour. They contained an offer by the defendant, as solicitor for that lady. These would be inadmissible as between the plaintiff and Miss Barbour, but in the present proceedings they are admissible as showing the source from which the sum of 115*l.* came, and that the defendant received it with notice: *In re Daintrey.* (1)]

Counsel for the plaintiff then called Miss La Roche, sister of the deceased, in order to prove that at an interview between the witness and Miss Barbour in June, 1920, Miss Barbour made certain admissions with regard to the circumstances under which the money was received, and as to her dealings with it.

Counsel for the defendant objected that this evidence, being "res inter alios acta," was inadmissible. He cited *Coole* v. *Braham.* (2)

With the same object counsel for the plaintiff also proposed to read certain letters written by Miss Barbour to the deceased before and after the receipt by her of the two drafts. These were objected to by counsel for the defendant upon the same grounds.

[*Walter Hedley.* This is an exception to the general rule that admissions by a stranger to a suit are not admissible against a party. The exception is explained in Taylor on Evidence, 11th ed., vol. i., § 750: "In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were *jointly*

(1) [1893] 2 Q. B. 116. (2) (1848) 18 L. J. (Ex.) 105.

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interested, or one was *derivatively* interested through the other; and a *mere community of interest* will not be sufficient." Here the defendant was derivatively interested through Miss Barbour. Again at § 759: "In some cases, the admissions of *third persons, strangers to the suit,* are receivable. These exceptions to the general rule arise when the issue is substantially upon the mutual rights of such persons at a particular time; in which cases the practice is to let in such evidence in general as would be legally admissible in an action between the parties themselves."

LUSH J. It is not very clear what is meant in the passage cited by the phrase "derivatively interested." I do not think this evidence is admissible.]

Apart from formal evidence, the only other evidence for the plaintiff consisted of the following admissions made by the defendant in his answers to interrogatories, sworn February 12, 1921:—

(*a*) that on or before July 24, 1920, he had notice of the death of Godfried La Roche;

(*b*) that Miss Barbour handed to him on July 24, 1920, the sum of 115*l.*, but that he did not know whether this sum was the 115*l.* referred to in his letter of July 19, 1920, as "the balance now in her hands";

(*c*) that the sum of 115*l.* was still in his hands on July 27, 1920, at the time of the service of the writ in the action.

Walter Hedley. As to the main issue I admit that the onus is on me to establish (*a*) that the money is trust money, and (*b*) that the sum of 115*l.* came into the hands of the defendant. That can only be done here by means of the admissions made by Miss Barbour and by the admission of the letters written without prejudice. Once that onus is discharged, the plaintiff is entitled to succeed on the authority of *In re Hallett's Estate.* (1) He can follow the money into the hands of the defendant, just as it is possible to follow a banker's draft, sent for a specific purpose, into the hands of the bank.

(1) (1879) 13 Ch. D. 696.

Le Breton K.C. and *A. E. Woodgate* (*Havers* with them) for the defendant. *In re Hallett's Estate* (1) is distinguishable. Here a claimant to certain monies, is seeking to follow it into the hands of a third party. Under such circumstances, there is nothing in the nature of a trust. There is no onus upon a solicitor to withhold monies entrusted to him by his client, if he hears that it is claimed by a third party.

[They cited *In re Becke* (2) and *Gray* v. *Johnston*. (3)]

LUSH J. [after stating the facts]. In the first place I think that the two letters of July 19 and 24, 1920, being written without prejudice, cannot be admitted in evidence either against the client on whose behalf they were written or against the solicitor who actually wrote them. There is no authority upon the point, but my reason is that to rule otherwise would in many cases make negotiations for the settlement of litigation almost impossible. Unless parties to such negotiations can feel safe in making an offer and stating the facts upon which it is based the door to negotiations may be closed. It is for the benefit of litigants and others, that statements should be freely made in order to settle litigation. That being so, it is necessary for me to hold that the solicitor who makes statements in the course of the negotiations "without prejudice" is similarly protected. If the solicitor cannot place before the other side all the material reasons which make the offer of settlement reasonable without fear of an action if the offer is refused, it would be difficult to negotiate at all.

Here the defendant wrote in his capacity as solicitor for Miss Barbour, and identified himself with her for the purpose of the offer, and it would be wrong to hold that a solicitor so acting should be exposed to an action by the other side because the letter contained a statement which could be used against him. The general principle applies as much to the solicitor as to the client for whom he acts, and I hold that these letters cannot be read as evidence against the defendant.

(1) (1879) 13 Ch. D. 696. (2) (1854) 18 Beav. 462.
(3) (1868) L. R. 3 H. L. 1.

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If that is so, there is no evidence before me that the defendant received this money knowing it to be trust money. In his answer to interrogatories, sworn February 12, 1921, the defendant admitted the receipt of 115*l.* from Miss Barbour on July 24, 1920, but he stated that he did not know whether that was the 115*l.* to which he had referred in his letter to the plaintiff's solicitor dated July 19, 1920, as "the balance now in her hands." He received that money from her for the purpose, as I gather, of her defence in the proceedings which were then threatened against her by the plaintiff. Therefore I must infer that her case was that she was under no duty to refund the money, in other words, that it was not trust money. It would be both unreasonable and impossible to say that her solicitor could not take steps to defend her or use the money otherwise than by paying it over to the plaintiff. There is no evidence before me either that the defendant knew it to be trust money or that it was in fact trust money.

Counsel for the plaintiff also sought to put in evidence statements made by Miss Barbour at an interview between Miss Barbour and the plaintiff's daughter, at which the defendant was not present; but Miss Barbour is not the agent of the defendant to make admissions for him. It is said that where "title" is in question, statements made by persons from whom that title is derived, which qualify or affect the title, are evidence against those who have acquired the title. It is I think true that, if a chattel is transferred, admissions made by the transferor at the time of or prior to the transfer, which qualify or affect his title, are admissible in evidence against the transferee; but no title is in question in this case. It is a simple case of money paid by the deceased to Miss Barbour and by her to the defendant. It is true that the money came from the deceased, but it cannot be said that the defendant derived title from Miss Barbour or—to use the expression in Taylor on Evidence (11th ed., vol. i., § 750) —that he was derivatively interested through her. It follows that this second branch of evidence also fails. The only course open to the plaintiff would have been to call Miss

Barbour, and this he elected not to do. I would add this. Here the solicitor has received a sum of money from his client for the purpose of his resisting on her behalf a claim by A, who says it is trust money and that the client is under a duty to return it. Under such circumstances I should be very loath to say that the solicitor, who cannot know the real truth of the matter, inasmuch as he hears one story from his client and another from A, is bound to hold the money, not for his client, but for A whose claim is not yet established.

This is not an ordinary case of the misuse of trust money. The defendant has utilised the money for the purpose for which he received it. Even if the difficulty of proof were surmounted, it would be hard for the plaintiff to succeed, and in this case judgment must be for the defendant.

Judgment for defendant.

Solicitor for the plaintiff: *Frank Patteson.*

Solicitors for the defendant: *Gustavus Thompson & Sons.*

F. P. F.

ATTORNEY-GENERAL *v.* BURNS AND OTHERS.

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Dec. 6, 7, 21.

Revenue—Estate Duty—Property situate out of the United Kingdom in respect of which Legacy or Succession Duty would be payable but for the Relationship of the Person to whom it passes—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *s.* 12—*Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *s.* 18—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 2.

By s. 1 of the Finance Act, 1894, estate duty is payable upon all property which passes on the death of a person.

By s. 2, sub-s. 2, "property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

A testator, who was domiciled in England and who died in 1890, by his will left large sums of money to trustees to be invested for his daughter for life and afterwards for such of her children as she should by deed or will appoint, and in default of appointment to her children in equal shares. Legacy duty was paid on the sums in question by the testator's executors. The testator's daughter, who died in 1919, by her will exercised the power of appointment given to her by the

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testator in favour of her children. The funds representing the sums of money above referred to consisted exclusively of stocks and bonds of American companies and corporations. The Attorney-General claimed estate duty in respect thereof under s. 2, sub-s. 2, of the Finance Act, 1894, as being property which was deemed under that Act to have passed on the death of the testator's daughter and so was liable to the duty:—

Held, that by virtue of s. 12 of the Legacy Duty Act, 1796, legacy duty was not payable on the death of the testator's daughter, legacy duty having been paid once and for all on the death of the testator, but that legacy duty would have been payable on the death of the testator's daughter but for the relationship of the parties to whom the property passed, and that therefore estate duty was payable under s. 2, sub-s. 2, of the Finance Act, 1894, on the death of the testator's daughter in respect of the funds and investments representing her share under the testator's will.

INFORMATION by the Attorney-General.

The facts stated shortly were as follows: Mr. J. S. Morgan died on April 8, 1890, and by his will, dated November 23, 1889, and proved in the Principal Probate Registry on May 7, 1890, he left 600,000*l.* to trustees to be invested for his daughter, the late Mrs. Burns, for life, and afterwards for such of her children as she should by deed or will appoint, and in default of such appointment to her children in equal shares.

The defendants were the present trustees, and it was admitted for the purposes of this case that the late Mr. J. S. Morgan was domiciled in England when he died. Legacy duty was paid on the sum in question by Mr. Morgan's executors.

Mrs. Burns died on July 20, 1919, and by her will dated December 2, 1908, and proved in the Principal Probate Registry on August 19, 1919, she exercised the power of appointment given to her under her father's will in favour of her children.

The funds representing the sums of money above referred to consisted exclusively of stocks and bonds of American companies and corporations.

The Attorney-General claimed a declaration that estate duty became payable on the death of Mrs. Burns in respect of the funds and investments representing her share or portion

under Mr. J. S. Morgan's will and that the defendants were accountable for such duty. He also claimed an order for all necessary accounts and inquiries.

Sir Gordon Hewart A.-G. and *Sheldon* for the Crown. Estate duty is payable on the death of Mrs. Burns on the funds and investments representing her portion under her father's will by reason of s. 2, sub-s. 2, of the Finance Act, 1894. Sect. 1 of the Act provides that estate duty is payable upon all property, real or personal, settled or not settled, which passes on the death of every person dying after the passing of the Act. In the present case legacy duty would have been payable in respect of these funds on the death of Mrs. Burns but for the fact that they passed to her children. The Legacy Duty Act, 1796, provided by s. 12 that where a legacy is enjoyed by different persons in succession who are chargeable with duties at one and the same rate, the duty shall be charged and paid as in the case of a legacy to one person, but where the legacy is enjoyed by different persons in succession who are chargeable with different rates of duty, those persons shall be chargeable with such duty when they become entitled to and begin to receive the produce of such bequest. In the present case the legacy duty payable by Mrs. Burns and by her children was at one and the same rate and as legacy duty was paid on the death of J. S. Morgan it was not payable on the death of Mrs. Burns, but it would have been payable but for the relationship of the persons to whom the property passed, and therefore estate duty is payable thereon under s. 2, sub-s. 2, of the Finance Act, 1894, notwithstanding that it is property situate out of the United Kingdom.

Sir John Simon K.C. and *A. M. Latter* for the defendants. Estate duty is not payable under s. 2, sub-s. 2, of the Finance Act, 1894, on the death of Mrs. Burns in respect of the funds and investments representing her share under her father's will. The test which s. 2, sub-s. 2, of the Act of 1894, imposes as to when estate duty is payable on foreign property has no application in the present case. Under that section estate

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duty is only payable if under the law in force before the passing of the Act legacy or succession duty is payable in respect thereof. Estate duty has been declared to be in principle analogous to the old probate duty which it superseded, subject to the express exception in the statute: see *Winans* v. *Attorney-General* per Loreburn L.C. and Lord Atkinson. (1) Probate duty was a duty payable to obtain probate of a will and did not depend upon the domicil of the deceased or upon the benefit any particular person derived under the will. It applied whenever there were assets within the jurisdiction as regards which probate was required in order to obtain them, and therefore the assumption is that estate duty is only payable in the like case. Legacy duty, on the other hand, is a duty on legacies, or on property passing on intestacy, payable when the testator is domiciled within the United Kingdom. Therefore the test as to whether the duty is payable is quite different from that in the case of probate duty. The scheme of the Legacy Duty Act, 1796, under which legacy duty was imposed, was that the duty should be imposed on legacies left by will and on intestacy at different rates; but originally the duty was not imposed on legacies left to children of the deceased or on legacies left to the husband or wife of the deceased. Under s. 12 when a legacy is left to different persons in succession and the rate of duty is the same, the duty is payable once for all. The test of liability to estate duty on property situate outside of the United Kingdom under s. 2, sub-s. 2, of the Act of 1894, is only satisfied if the question as to the liability to legacy duty arises on the giving of a legacy by the person on whose death the devolution takes place. Legacy duty is not payable on the death of Mrs. Burns merely because her children are now enjoying property which had been enjoyed by Mrs. Burns. She did not give the legacy; it passed under the will of J. S. Morgan. Legacy duty was payable and was paid on the legacy on the death of J. S. Morgan in 1890, and therefore under s. 18 of the Succession Duty Act, 1853, no question of succession duty arises.

(1) [1910] A. C. 27, 30, 34.

Legacy duty having been charged and paid on the legacy given by the will of J. S. Morgan in 1890, no legacy duty is payable on the passing of the property on the death of Mrs. Burns to her children. The last words of s. 2, sub-s. 2, of the Finance Act, 1894, "or would be so payable but for the relationship of the person to whom it passes," refer to a case where a legacy is left by a husband to his wife, or by a wife to her husband, and do not refer to a case like the present. The section can only be held to render foreign property subject to estate duty where reasonable machinery for enforcing the tax is available.

[*In re Dowager Duchess of Manchester* (1) was also cited.]

Sheldon in reply. Estate duty is only so far analogous to probate duty as it is chargeable on the property on the death of the deceased, but it is chargeable on much more than on the property liable to probate duty. Probate duty was only a duty on personal property within the jurisdiction and did not affect real or settled property, whereas estate duty is chargeable not only on the deceased's personal property within the jurisdiction but also on the deceased's real property, settled property and property situated out of the United Kingdom, and in many cases property which did not belong to the testator becomes subject to estate duty. Legacy and succession duties do not fall upon the property passing upon a death, as estate duty does, but upon the benefits received by survivors on their accession upon a death: see *Winans* v. *Attorney-General*. (2) Sect. 1 of the Act of 1894 imposes estate duty upon "all property, real or personal, settled or not settled, which passes on the death." Therefore all property whether within or without the United Kingdom which passes on the death of the deceased is made chargeable with the duty. Sect. 2, sub-s. 2, exempts foreign property from the duty in the cases specified in the section; but for that section all foreign property of the deceased would be liable to the duty. The deceased on whose death the property passed in the present case was Mrs. Burns; the property in question was her settled property, and estate duty

(1) [1912] 1 Ch. 540. (2) [1910] A. C. 30.

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became payable on the date of her death. Legacy duty was not payable on that date, but it would have been payable but for the relationship between the parties, owing to which fact it was paid in one lump sum on the death of the testator. If however the money had been left on Mrs. Burns' death to her first cousin instead of to her children legacy duty would have been payable. When property passes on the death of the tenant for life and his executor is not accountable for estate duty in respect thereof every person to whom the property passes for a beneficial interest in possession is under s. 8, sub-s. 4, of the Act of 1894, liable to pay estate duty. It may be that if the trustees of property cannot be made accountable for the duty the duty cannot be obtained unless a charge can be obtained on the property. But even though the duty cannot be collected the section ought not to be construed otherwise than in a natural way.

Cur. adv. vult.

1921. Dec. 21. SANKEY J. read the following judgment: This is a claim for estate duty alleged to be payable by the defendants on the death of the late Mrs. Burns. The facts, which are of a somewhat complicated character, are set out with substantial accuracy in the information, but for the purposes of this judgment they may be briefly stated, as far as they are material, as follows: [His Lordship then read the facts set out above and continued:] The Attorney-General claims estate duty in respect of the funds representing the sums of money above referred to under s. 2, sub-s. 2, of the Finance Act, 1894, as being property which is deemed under that Act to have passed on Mrs. Burns' death and so is liable to the duty. If that contention is correct the defendants are the proper persons to be sued under s. 8, sub-s. 4, of the Act.

Turning to the Act itself, it will be seen that s. 1 levies estate duty on property passing on the death of a person. Sect. 2 introduces an artificial element, because it brings into the area of taxation certain classes of property which it says shall be deemed to pass on the death of the deceased. This

has led to results which would possibly surprise the framers of the section and may conceivably in some instances entitle the Crown to estate duty which it has not the means to recover. Great reliance was placed by the defendants on considerations of this character, but having regard to the artificial nature of the legislation, such considerations do not assume the importance they otherwise might have done.

Now the point here is, does the Act make this property to be property which passed on the death of Mrs. Burns? This depends on s. 2, sub-s. 2, which is as follows: "Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes." The question to be answered, therefore, is: Under the law in force before the passing of the Finance Act, 1894, would (*a*) legacy duty or (*b*) succession duty have been payable but for the relationship of the person to whom it passed?

(1.) As to legacy duty: Would it have been payable but for the relationship of the person to whom it passed? Some argument was attempted to be advanced on behalf of the defendants by referring to certain remarks made by Lord Loreburn and Lord Atkinson in *Winans* v. *Attorney-General* (1), to the effect that estate duty was analogous to the old probate duty and that that duty was only payable in order to obtain assets in this country by getting the will proved. In my view these remarks must be taken "secundum subjectam materiam" and have no bearing on the present case. The problem to be solved depends upon a true construction of s. 12 of the Legacy Duty Act, 1796. It is a long section, but it enacts how duty on legacies enjoyed by persons in succession or having partial interests therein shall be charged. Two cases are there contemplated: (1.) Where the duty payable by the different persons in succession is at one and the same rate. (2.) Where the duty payable by the different persons in succession is at different rates, or

(1) [1910] A. C. 30, 34.

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one or more of them is not liable to any duty. In the first of these cases the duty is payable as in the case of a legacy to one person, i.e., once and for all; in the second case a different principle applies and different times are enacted for payment by the different persons.

Now the case under consideration comes within the first of these two alternatives by reason of the relationship of the parties: see the Stamp Act, 1815 (55 Geo. 3, c. 184), Schedule, Part III., and the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 58. In fact, because of the relationship between these parties legacy duty has been paid, and paid once and for all. But for that relationship the case would have fallen under the second alternative. When Mrs. Burns came to die there was no further legacy duty payable; it had been paid once and for all, because the relationship made it payable at one and the same rate, and so once and for all, as in the case of one person. In my opinion but for the relationship of the persons to whom the property passed legacy duty would have been payable on the death of Mrs. Burns.

(2.) As to succession duty: Would it have been payable but for the relationship of the person to whom it passed? Succession duty is payable if the proper forum for the execution of the trusts is in England, if the settlement is a British settlement: see *Attorney-General* v. *Jewish Colonization Association*, per A. L. Smith M.R. (1); and *Attorney-General* v. *Johnson*, per Bray J. (2) At the death of Mrs. Burns (1.) the beneficiaries under Mr. Morgan's will were here, (2.) one trustee was here, (3.) the will was an English one. And in my opinion the proper forum for the execution of the trusts was in England and the settlement was a British settlement. Succession duty would have been payable under the Succession Duty Act, 1853, but for the exemption granted thereunder by s. 18 in cases where legacy duty has been paid. The only reason why succession duty was not payable in this case was because legacy duty had been paid once for all by reason of the relationship of the

(1) [1901] 1 K. B. 123, 131. (2) [1907] 2 K. B. 885, 894.

parties. I therefore hold that this case comes within s. 2, sub-s. 2, and make the declaration asked for—namely, that on the death of Mrs. Burns estate duty became payable in respect of the funds and investments representing her share or portion under Mr. J. S. Morgan's will.

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There will be an order for all necessary accounts and inquiries and for payment of the amount of duty payable.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Bircham & Co.*

R. F. S.

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Nov. 8, 9.

Apprentice—Apprenticeship Deed—Dismissal of Apprentice by Master—Misconduct of Apprentice—Repudiation of Agreement.

In an action against a master for dismissing his apprentice the county court judge found that the apprentice, wishing to put an end to the apprenticeship, so deliberately misconducted himself that in a business sense it was impossible for the relation of master and apprentice to continue, and that his conduct before the dismissal amounted to a repudiation of the agreement:—

Held, that the apprentice could not repudiate the agreement unless repudiation was for his benefit, and the case was sent back for it to be ascertained whether it was for his benefit or not.

APPEAL from the Portsmouth County Court.

The plaintiff, Frederick Thomas Waterman, an infant, by an indenture dated September 23, 1919, put himself apprentice to the defendant, trading as Fryer & Co., Portsmouth, for five years, whereby the defendant undertook to instruct the plaintiff in his trade of motor and cycle engineer, and the plaintiff undertook that he "faithfully shall serve . . . . [his] lawful commands everywhere gladly do . . . . [and] in all things as a faithful apprentice . . . . shall behave himself towards [the defendant]." No premium was paid. On July 7, 1921, the plaintiff, by his father as next friend, claimed damages against the defendant, first, for breach of

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his agreement to teach, and secondly, for wrongfully dismissing the plaintiff on May 23, 1921, that is, terminating the contract of apprenticeship.

In his judgment the county court judge held, on the grounds set out infra, that there had been no breach of the agreement to teach, and there was no appeal against this part of the judgment as being a question of fact. The judgment continued: "They [the plaintiff and his father] thought . . . . that they had made a bad bargain. . . . . The plaintiff made up his mind not to serve the full time and conducted himself in a manner altogether incompatible with satisfactory relations as between master and apprentice. He was careless and indifferent about his work, neglectful of orders, disobedient and frequently insolent. The defendant realised that the boy was doing no good with him and that a continuance of the relations . . . . would be injurious to his own business and . . . . offered to release the plaintiff altogether . . . . but the offer was declined. This refusal is not to be taken as any indication that plaintiff desired the contract to be carried out, for I am satisfied that he did not mean it should be, but wished to force the defendant so to act as to give rise to a cause of action against him. I have no doubt that . . . . he was acting under the advice of other persons. In the end his conduct not only prevented the defendant from carrying out the contract to teach him, but became such as no employer in defendant's position could be expected to tolerate. He had workmen and other apprentices in his employ and to my mind it was in a business sense impossible to have about the premises for several years to come an apprentice behaving as plaintiff was behaving . . . . I find [that] . . . . the plaintiff's conduct amounts to deliberate and advised repudiation. On May 23, when plaintiff was again guilty of deliberate disobedience and insolence, the defendant sent him home, and wrote his father renouncing the contract." He therefore gave judgment for the defendants, but provisionally assessed the damages on the second head of claim at 20*l.*

The plaintiff appealed.

Stuart Bevan K.C. and *Slesser* for the plaintiff. There is no appeal from the finding of the county court judge that the defendant did not fail to teach the plaintiff his craft, as it is a finding of fact. But the county court judge has found that the defendant was entitled to dismiss the plaintiff because the plaintiff had repudiated the contract, applying the principle of *Hochster* v. *De La Tour* (1); *Frost* v. *Knight* (2); and *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3) That principle does not apply to this case. An apprentice cannot repudiate his contract unless it can be shown that repudiation is for his benefit: *Rex* v. *Great Wigston* (*Inhabitants*). (4)

[*Winstone* v. *Linn* (5) was also referred to.]

The county court judge was not invited to and did not apply his mind to that point.

The covenants of master and apprentice in an apprenticeship deed are independent covenants, and the apprentice's refusal to obey orders does not justify the master dismissing him. There is no case showing that inattention to work, rudeness, or conduct of that kind will justify dismissal by the master, though it might be an answer to an action for failure to teach. In the olden days the master could chastise the apprentice, or bring an action for damages; and the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), still provides a summary remedy. Even in a case where the plea was that the apprentice defrauded and robbed his master the plea was held bad in an action for dismissing the apprentice: *Phillips* v. *Clift.* (6) In *Cox* v. *Mathews* (7) the contrary was held; but there the apprentice was a habitual thief, and the slander charge was the most prominent part of the case. In *Wise* v. *Wilson* (8) the servant was not really an apprentice. All that *Hughes* v. *Humphreys* (9) decides is that a master cannot teach an apprentice who is absent.

In *Learoyd* v. *Brook* (10) A. L. Smith J. followed *Cox* v.

(1) (1853) 2 E. & B. 678.
(2) (1872) L. R. 7 Ex. 111.
(3) (1882) 9 Q. B. D. 648.
(4) (1824) 3 B. & C. 484.
(5) (1823) 1 B. & C. 460, 467.
(6) (1859) 4 H. & N. 168.
(7) (1861) 2 F. & F. 397.
(8) (1844) 1 C. & K. 662.
(9) (1827) 6 B. & C. 680.
(10) [1891] 1 Q. B. 431.

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Mathews (1), and that case marks the extreme point to which the law, which the learned judge was taking the opportunity to modernise, should be extended.

[*Westwick* v. *Theodor* (2) and *Raymond* v. *Minton* (3) were referred to.]

Harold Morris K.C. and *Blake Odgers* for the defendant. The covenants in an indenture of apprenticeship are in general independent, so that misconduct on the part of the apprentice is no defence in an action against the master for refusing to teach. But it is a good defence that the apprentice has refused to be taught: Bullen and Leake's Pleading, 3rd ed., p. 69, note (*a*). That is the present case.

[*Ellen* v. *Topp* (4) was referred to.]

The conditions of apprenticeship have altered. Formerly the apprentice used to live with the master and was one of the family, and could be corrected; but that is so no longer. The basis of the contract is that the master undertakes to teach an apprentice who is willing to be taught: per Holroyd J. in *Hughes* v. *Humphreys* (5); and if the latter does not will to be taught, whether he manifests his intention by absence or calculated misconduct—that is to say, something more than mere boy's idleness and inattention—that goes to the root of the contract: *Hughes* v. *Humphreys*. (6) All that the county court judge meant by "repudiation" was that the plaintiff had rendered teaching impossible, and he has found that the plaintiff's misconduct went to the root of the contract.

[*Learoyd* v. *Brook* (7) and *Ellen* v. *Topp* (4) were also referred to.]

If the county court judge meant that the plaintiff repudiated the contract the case should go back for him to ascertain whether repudiation was for his benefit.

Slesser in reply. The remedy under the Employers and Workmen Act, 1875, is a real remedy, and the defendant

(1) (1861) 2 F. & F. 397.
(2) (1875) L. R. 10 Q. B. 224.
(3) (1866) L. R. 1 Ex. 244.
(4) (1851) 6 Ex. 424.
(5) 6 B. & C. 680, 688.
(6) 6 B. & C. 680.
(7) [1891] 1 Q. B. 431.

should have resorted to it. The question as to repudiation being beneficial or not was not raised by anybody at the trial, or on the pleadings. It is held that it is beneficial for an infant to bind himself as apprentice; to say that it is also beneficial that he shall dissolve the apprenticeship agreement involves a contradiction: per Abbott C.J. in *Rex* v. *Great Wigston* (*Inhabitants*). (1) The case should not, therefore, be sent back.

HORRIDGE J. This was an action brought by an apprentice against his master, and I think it is one of those cases in which it is better to lay down what the law is before dealing with the facts.

The plaintiff was an infant, suing by his father. I think that the cases, of which *Winstone* v. *Linn* (2) and *Phillips* v. *Clift* (3) are examples, lay down this proposition—that in the case of an indenture of apprenticeship the covenants are not dependent one upon another, and that misconduct which is a breach of the covenant entered into by the infant does not entitle the master to dismiss him. I think the case of *Rex* v. *Great Wigston* (*Inhabitants*) (4) lays down the proposition that an infant cannot assent to a revocation of a contract unless such revocation is for his benefit. That seems clear from the language of Abbott C.J. (1): "It is a general rule of law that an infant cannot do any act to bind himself unless it be manifestly for his benefit. Binding himself an apprentice has been considered such an act, and therefore it has been held that an infant is competent to make such a contract. If then it is for the benefit of the infant to bind himself an apprentice, it is impossible to say generally, that it is for his benefit to dissolve such a connection; such a position involves a contradiction. That being the general rule, we must inquire whether in the particular instance it is for the advantage of the infant to dissolve his apprenticeship." I think that the case of *Learoyd* v. *Brook* (5) establishes that there may be

(1) 3 B. & C. 484, 486.
(2) 1 B. & C. 460.
(3) 4 H. & N. 168.
(4) 3 B. & C. 484.
(5) [1891] 1 Q. B. 431.

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such conduct on the part of an infant as goes to the purpose of the employment in such a way as to render the carrying out of the contract by the master impossible. A. L. Smith J. says (1): "The master has contracted to teach the apprentice how to carry on a pawnbroker's trade honestly. That must be the contract by the master. The apprentice, by becoming an habitual thief, has rendered that impossible." That case has gone further in relieving the master than any case cited to us, and I do not propose to extend it beyond the proposition which it establishes.

There is another class of case represented by *Hughes* v. *Humphreys* (2), which shows that if an apprentice absents himself from the service, the master cannot be sued for not teaching him during the period when he so absents himself. That is on the principle that the master commits no breach of his covenant if the infant has put it out of the master's power to perform his covenant.

Having dealt with those propositions, let me come to the actual facts of this case. The county court judge has found that the plaintiff made up his mind not to serve the full term and conducted himself in a manner altogether incompatible with satisfactory relations between master and apprentice. "He was careless and indifferent about his work, neglectful of orders, disobedient and frequently insolent. The defendant realised that the boy was doing no good with him and that a continuance of the relations, whilst of no benefit to the plaintiff would be injurious to his own business, and after complaining several times to the plaintiff and his father to no purpose, he offered to release the plaintiff altogether. That at any rate showed that he was not at all anxious to secure a servant at inadequate pay (as was suggested in the correspondence and at the trial); but the offer was declined. This refusal is not to be taken as any indication that the plaintiff desired the contract to be carried out, for I am satisfied that he did not mean it should be, but wished to force the defendant so to act as to give rise to a cause of action against him. I have no doubt that in adopting this attitude

(1) [1891] 1 Q. B. 433. (2) 6 B. & C. 680.

he was acting under the advice of other persons. In the end his conduct not only prevented the defendant from carrying out the contract to teach him, but became such as no employer in defendant's position could be expected to tolerate. He had workmen and other apprentices in his employ and to my mind it was in a business sense impossible to have about the premises for several years to come an apprentice behaving as plaintiff was behaving . . . . and on the face of the facts as I find them here the plaintiff's conduct amounts to deliberate and advised repudiation." The action was brought for wrongful dismissal.

Now did the conduct of the plaintiff amount to anything more than breach of his agreement with the employer? I do not think it did, and if so, it is within the cases I have referred to where it was held that the covenants are independent of each other. Therefore the plaintiff's conduct was no answer to the claim against the defendant.

Then can it be said that it came within the principle stated by A. L. Smith J. in *Learoyd* v. *Brook* (1)? I do not think there is any finding of the judge, or any evidence that the conduct of the plaintiff was of such a character that the master was not bound to keep him in his employ. It is very different from the conduct with which A. L. Smith J. had to deal. The county court judge put the present case as one in which the conduct of the plaintiff amounted to an indication by him that he had no intention of continuing to be bound by the contract. I think there was evidence to support that finding. But what did that inference amount to? On the authority of *Rex* v. *Great Wigston* (*Inhabitants*) (2) the plaintiff, as an infant, could not have made an agreement to cancel unless the agreement was for his benefit. The county court judge decided this case on the principle that one party may by acts or words say to the other party "I am not going to carry out this contract," and the other may reply, "I will accept your breach and sue you for damages." But that, in the case of an infant, would enable him to do indirectly what he could not do directly

(1) [1891] 1 Q. B. 431. (2) 3 B. & C. 484.

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—namely, cause the contract to be rescinded. He cannot do that unless the rescission is for his benefit. This point does not seem to have been present to the mind of the county court judge. I think that the case must be sent back to him to find whether the repudiation of the contract by the defendant would or would not be for his benefit; there is evidence upon which he could find either way. If he decides that it would the defendant will have established his case; if he decides the contrary then the plaintiff succeeds.

SHEARMAN J. I am of the same opinion. I arrive at the same conclusion though not quite by the same process of thought.

The action was brought claiming damages against the master for putting an end to the contract, and the defence was that the conduct of the plaintiff was such that the defendant was entitled to put an end to it. The authorities show that in the early days there was the greatest reluctance to break any contract of apprenticeship. It was considered of very great importance that children should be taught a trade, and the Courts, in view of the great power which masters then had over apprentices, who generally resided with them, held that the obligation of the apprentice to serve and that of the master to teach were not interdependent but independent covenants. It was at the bottom of the reasoning in the older cases that the master could make the apprentice serve, even though the latter was unwilling. That is practically impossible nowadays; but formerly, the apprentice lived in the master's house, and could be locked up, deprived of food, or chastised; and society tolerated that state of things. The master was in the position of a schoolmaster and could be made to teach. He could not defend an action, still less could he put an end to an apprenticeship deed, because he had it in his power to make the apprentice do all that the apprentice had bound himself to do. When we come to the later cases we find, as not infrequently happens in the history of cases, that the Courts, in view of social changes, found themselves able to distinguish

when not absolutely bound by authority; and we find that in later cases, when an action was brought for failing to maintain and teach, it was an answer to that action to say, as in *Hughes* v. *Humphreys* (1), that the apprentice had absented himself for good, and that that fact was an answer to the action, because there was no longer any power to enforce the duties on him; or as in *Raymond* v. *Minton* (2), that the apprentice would not be taught, and by his own acts had prevented the master from teaching him. Then in 1891 came the case of *Learoyd* v. *Brook*. (3) There the apprentice had been habitually stealing money from his master's till, and A. L. Smith J. in a considered judgment extended the principle of *Hughes* v. *Humphreys* (1)—though he did not mention that case—and *Raymond* v. *Minton* (2), and said that where there is habitual and systematic conduct, arising out of the character of the apprentice, which renders it impossible that the work of service and of teaching should continue, the master is at liberty to put an end to the contract. I think the principle laid down in that case was that if there has been a course of conduct which renders it impossible in the interests of the master, of the community, and, it may be said, of the apprentice himself, that the relationship should continue then the master is entitled to put an end to the contract. I have no doubt that habitual intemperance would come within the same principle.

Now, did the facts in this case come within that principle? The facts found were, that the plaintiff habitually acted and was determined so to act that he might get dismissed. The county court judge said that no self-respecting master could have continued to tolerate such conduct. But then the learned judge did not go on to find as a fact that the master was justified in putting an end to the apprenticeship, and that the case came within the principle of *Learoyd* v. *Brook* (3); he founded his decision on the ground that there was conduct by the apprentice which amounted to a repudiation of the contract, and that the master was then at liberty

(1) 6 B. & C. 680. (2) L. R. 1 Ex. 244.
(3) [1891] 1 Q. B. 431.

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to accept or refuse the repudiation and had accepted it; and, therefore, that there was by conduct a new contract between them. I need not add anything to what my Lord has said on that part of the case. The county court judge could not hold that there had been an effective repudiation unless he was satisfied it was for the benefit of the infant; but he did not decide that. There is evidence upon which he may so decide if he thinks fit. I agree that the case should go back to him to decide this question.

Appeal allowed. Case sent back.

Solicitors for plaintiff: *Mills, Lockyer, Church & Evill.*

Solicitors for defendant: *Joynson-Hicks & Co., for Lyndhurst G. Groves, Portsmouth.*

W. L. L. B.

1921

Nov. 17.

RUTHERFORD, SENDER AND COMPANY, LIMITED *v.* GOLDTHORPE, SCOTT AND WRIGHT, LIMITED.

THE STARTFORTH.

Shipping—Charterparty—Time Charterparty with Option of Renewal—Sub-charterparty to continue to End of renewal Period—Repudiation of Contract by Sub-charterer—Non-exercise of Option to renew by Charterer—Right of Charterer to Damages from Sub-charterer.

Under a charterparty from the owners the charterers were entitled to a steamship until September 29, 1920, with the option on giving thirty days' notice before that date, of continuing the charterparty for three months longer. A sub-charterparty of the steamship granted by the charterers, which would otherwise have continued in force up to December 22, 1920, was, in consequence of a breach by the sub-charterers, terminated on October 2, 1920. The charterers did not exercise their option of renewal and their charterparty accordingly terminated on the date first above mentioned. On September 25, 1920, the owners chartered the steamship to the sub-charterers as from the time when it was delivered to them. On October 2, 1920, the steamship was redelivered by the sub-charterers to the charterers, and by the latter to the owners. The charterers claimed from the sub-charterers as damages for the breach by the latter of their contract the loss of the profits which they would have made during the period from October 2, 1920, when the steamship was redelivered, to December 22,

1920, when but for the breach the sub-charterparty would have expired:—

Held, that the charterers could not recover the damages claimed, inasmuch as, owing to their not having exercised their option of renewal, they could not have given the sub-charterers the use of the steamship during the above period; and that it made no difference that the sub-charterers had themselves obtained a charter of the steamer from the owners.

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SPECIAL CASE stated by an umpire for the opinion of the Court.

By a charterparty dated October 21, 1919, the Parkley Steamship Co. (hereinafter called "the owners") chartered the steamship *Startforth* to Messrs. Rutherford, Sender & Co., Ld., hereinafter called the charterers, for the term of three calendar months from the time the steamship was delivered and placed at the disposal of the charterers ready to load and after written notice had been given as therein mentioned. The hire payable by the charterers was 3*l.* 4*s.* 6*d.* per ton deadweight on a deadweight capacity of 200 tons per calendar month. The charterparty contained (inter alia) a provision that the charterers should have the option of continuing the charterparty for three further periods of three calendar months each on giving written notice thereof to the owners at least thirty days previous to the expiration of the first-named and any subsequent term. On December 29, 1919, the steamship was delivered to the charterers under that charterparty, and they exercised the option of continuing the charterparty for two of the further periods of three calendar months mentioned therein.

By a sub-charterparty dated January 15, 1920, the charterers sub-chartered the steamship to Messrs. Goldthorpe, Scott & Wright, Ld. (hereinafter called the sub-charterers), for the term of three calendar months from the time the steamship was delivered and placed at the disposal of the sub-charterers ready to load, and after written notice as therein mentioned. The hire payable to the charterers was 4*l.* 5*s.* per ton deadweight on 215 tons per calendar month. The last-mentioned charterparty contained (inter alia) a provision that the sub-charterers should have the option

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of continuing the sub-charterparty for a further period of three calendar months on giving written notice thereof to the charterers at least thirty days previous to the expiration of the first-named term. On January 21, 1920, the steamship was delivered to the sub-charterers under the sub-charterparty, and the sub-charterers exercised the option of continuing it for the further period of three calendar months.

By a charterparty dated June 26, 1920, the charterers sub-chartered the steamship, concurrently with the sub-charter dated January 15, 1920, up to about December 22, 1920, from the time the steamer was delivered and placed at the disposal of the sub-charterers ready to load and after written notice as therein mentioned. The last-mentioned sub-charterparty contained a clause that the sub-charterers should pay as hire for the steamer 3*l.* 10*s.* per ton dead-weight on 200 tons per calendar month commencing from the time the steamship was placed at the disposal of the sub-charterers, until her redelivery to owners.

On August 17, 1920, the sub-charterers wrote to the charterers that they must terminate the last-mentioned sub-charterparty on September 21, 1920, and correspondence thereupon took place between these parties and their respective brokers, it being contended on behalf of the sub-charterers that they had an option to cancel that sub-charterparty on September 22, 1920, and on behalf of the charterers that that sub-charterparty was to continue up to about December 22, 1920.

On August 26, 1920, the charterers wrote to a receiver who had been appointed in connection with the owners notifying him that it was not their intention to exercise the last option of three months mentioned in the charterparty of October, 1919. Subsequently, correspondence took place between the solicitors for the charterers and the sub-charterers respectively with regard to the redelivery of the steamship, the charterers' solicitors contending that their clients were not entitled to redeliver the steamer until about December 22, 1920, and the sub-charterers' solicitors contending that their clients were entitled to redeliver her about October 1, 1920.

The receiver of the owners, having inferred from a conversation with the charterers that they were not prepared to pay more than 40*s.* per ton, without communicating with them again and without their knowledge, by a charterparty dated September 25, 1920, chartered the steamship to the sub-charterers for a term of three calendar months from the time it was delivered and placed at their disposal and after written notice as therein provided. The hire payable under the last mentioned charterparty was 2*l.* 5*s.* per ton on deadweight of 200 tons.

On the last mentioned date, September 25, 1920, the charterers' solicitors wrote to the sub-charterers' solicitors: "There can be no question but that the charter runs until the 22nd December, 1920, and the attempt on your clients' part to give up the steamer on or about the 22nd September is wholly unwarranted, and our clients will refuse to accept redelivery some time next week as we understand your clients are now trying to insist upon."

On September 27, 1920, the sub-charterers' solicitors replied as follows: "With reference to your contentions in this matter that our clients' charter runs until the 22nd December, we are informed that prior to the 17th September your clients had notified the owner that they do not desire to exercise their option to extend their charter from September until December next. We are also informed that this vessel has therefore been chartered elsewhere by the owner." On September 28, 1920, the charterers' solicitors wrote in reply to the sub-charterers' solicitors: "As your clients insist upon the boat being redelivered, our clients have agreed that under protest they will take redelivery and hold your clients responsible for all damages which they may suffer in consequence of your clients' breach." On September 29, 1920, the sub-charterers' solicitors replied: "We are in receipt of your letter of the 28th inst., contents of which we note. With reference to your concluding paragraph your clients can have no claim against our clients such as you suggest."

On October 2, 1920, the steamship was redelivered by the

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sub-charterers to the charterers and by the charterers to the receiver of the owners.

The charterers' claim was (inter alia) in respect of estimated damages for breach of contract based on the loss of profits from October 2, 1920, the date of redelivery of the said steamship, to December 22, 1920, the date at which the charterers contended that the charterparty expired, and they claimed 270*l.* 7*s.* 2*d.*

The sub-charterers contended: (1.) That the charterers never accepted, and/or that there was no evidence that they ever accepted any purported repudiation or anticipatory breach of the sub-charterparty by the sub-charterers prior to September 25, 1920. (2.) That on this date by their letter from their solicitors the charterers again refused to accept the purported repudiation or anticipatory breach. (3.) That in consequence any purported repudiation or anticipatory breach was inoperative and of no effect in law, but that the contract remained alive for the benefit and at the risk of both the parties thereto. (4.) That prior to September 25, 1920, and/or prior to any purported repudiation or anticipatory breach having been accepted by the charterers it became impossible for the charterers to give the sub-charterers the continued use of the steamship by reason of the fact that the charterers had not validly exercised, and/or had lost, the right to exercise their option to extend their hire of the steamship. (5.) That the charterers were not entitled to any damages covering the period after they had ceased to be time charterers of the steamship.

The umpire held: (1.) That the sub-charterers committed a breach of the contract contained in the sub-charterparty of June 26, 1920, in insisting upon the redelivery of the steamer on October 2, 1920. (2.) That the sub-charterers were not entitled to redeliver the steamship before December 22, 1920. (3.) That the charterers were justified in refraining from exercising the option of the last period of three months under the charterparty of October 21, 1919, having regard to the fall in the freight market and the notice which they had of sub-charterers' determination not to carry out the

sub-charterparty of June 26, 1920. (4.) That the charterers had suffered damage by the sub-charterers' breach of contract. (5.) That that damage was the loss of profit they would have made during the period from October 2 to December 22, 1920, and amounted to 266*l.* 16*s.*

The question for the Court was, whether upon the facts found by the umpire and the true construction of the sub-charterparty of June 26, 1920, the charterers were in law entitled to recover from the sub-charterers in respect of damages for breach of the sub-charterparty the said sum of 266*l.* 16*s.*

Jowitt for the sub-charterers. The question raised by the case should be answered in the negative. The charterers are not entitled to recover from the sub-charterers any damages for breach of the sub-charterparty. Assuming that the umpire has found that there was on September 28, 1920, an acceptance by the charterers of the sub-charterers' renunciation of their contract and therefore a breach by the sub-charterers terminating that contract, it does not follow that the charterers are entitled to recover in respect of that breach the damages which they claim or any damages. The charterers, by failing to exercise by August 29, 1920, their option of renewing their charterparty from the owners, prevented that charterparty from continuing beyond September 29, 1920. They therefore put it out of their power to grant the continued use of the steamship to the sub-charterers and to earn any further freight from them. Thus, notwithstanding the breach by the sub-charterers of their contract the charterers are not entitled to recover from them as damages for that breach the loss of profits which the charterers by their own act made it impossible for them to earn. The sub-charterers by obtaining a sub-charterparty of the vessel from the owners on September 25, 1920, did not commit a breach of their contract with the charterers.

Le Quesne for the charterers. The question raised should be answered in the affirmative. The charterers are entitled to recover the damages which they claim. The acceptance

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by the charterers on September 28, 1920, of the repudiation which the sub-charterers had purported to make of their sub-charterparty, constituted a breach by the sub-charterers of the sub-charterparty on that date. The charterers are entitled, in the absence of any reason to the contrary, to recover from the sub-charterers as damages for that breach the loss of the profits which but for the breach the charterers would have earned during the period from October 2, 1920, when the steamship was redelivered to them by the sub-charterers, to December 22, 1920, when that sub-charterparty would otherwise have expired. There is no reason why the charterers should not recover these damages from the sub-charterers. They are not disentitled to recover them by the mere fact that they allowed their charterparty from the owners to expire on September 29, 1920, because that of itself did not necessarily prevent them from getting another charter of the vessel from the owners and giving the continued use of it to the sub-charterers: see *Cort* v. *Ambergate Ry. Co.* (1); and *Braithwaite* v. *Foreign Hardwood Co.* (2) The charterers are not disentitled to these damages by their inability to give the sub-charterers the continued use of the vessel, because that is due to the action of the sub-charterers in having themselves obtained a charter of the vessel from the owners.

Jowitt replied.

HORRIDGE J. In this case it is only necessary to consider the position of the parties in and after August, 1920. In that month, under a charterparty of the steamship *Startforth* from the charterers to the sub-charterers the latter were bound to continue to hire the steamship up to about December 22, 1920. In August, 1920, the sub-charterers began to give notice to the charterers that they would not keep the steamship after September 21, 1920. They had no right to do that. They continued to insist that they were entitled to terminate the sub-charterparty on that date. Thereupon the charterers by their brokers replied that the

(1) (1851) 17 Q. B. 127. (2) [1905] 2 K. B. 543.

sub-charterers had no right to terminate the contract on that date, and that the charterers could not accept their notice and were holding them to the terms of the sub-charterparty. On September 28, 1920, however, the charterers having been told that the owners of the steamship, from whom they themselves held it, had chartered it to other persons, their solicitors wrote this letter to the sub-charterers' solicitors: "As your clients insist upon the boat being redelivered, our clients have agreed that under protest they will take redelivery and hold your clients responsible for all damages which they may suffer in consequence of your clients' breach." On October 2, 1920, the steamship was redelivered by the sub-charterers to the charterers, and by the latter to the owners.

The first question is whether in these circumstances there was an acceptance by the charterers of the repudiation or anticipatory breach by the sub-charterers of the sub-charterparty which put an end to the contract between these parties. If the umpire has found that there was in fact an acceptance of the repudiation or breach, his finding is conclusive. I think that the umpire has done so. He has found that the sub-charterers committed a breach of the contract contained in their sub-charterparty in insisting upon the redelivery of the steamship by them on October 2, 1920. He has also found that on that date the redelivery of the steamship was accepted by the charterers. On these findings the redelivery could only have been accepted by the charterers as a breach by the sub-charterers of their sub-charterparty. The umpire thus finds in effect that on the last-mentioned date there was an acceptance by the charterers of the breach of the sub-charterparty by the sub-charterers. On that date there was thus a breach by the sub-charterers of the sub-charterparty of June, 1920, from the charterers to them by which that sub-charterparty was terminated.

I now come to the second question which I have to decide. That question as stated by the umpire is: Whether upon the facts found by him and the true construction of the sub-charterparty of June 26, 1920, the charterers were in law

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entitled to recover from the sub-charterers in respect of damages for breach of the sub-charterparty the said sum of 266*l.* 16*s.* That sum is the loss of profit which the umpire has found that the charterers would have made during the period from October 2 to December 22, 1920. I have therefore to consider whether the charterers are entitled to recover from the sub-charterers as damages for breach of the sub-charterparty by the sub-charterers on October 2, 1920, the loss of the profits which the charterers would have made from October 2 to December 22, 1920. What was the position of the parties at the beginning of and during that period? It was this: Under the head charterparty the charterers were entitled to the steamship up to September 29, 1920, with the option of continuing the charterparty until December 22, 1920, on giving notice to the owners thirty days before September 29, 1920. By a letter dated August 26, 1920, they notified the owners that they elected not to exercise their option of continuing the charterparty, and they were therefore not entitled to the possession of the vessel after September 29, 1920. It is thus clear that when the vessel was wrongly redelivered by the sub-charterers to the charterers on October 2, 1920, the charterers were bound to redeliver her to the owners and had no longer any rights in her which they could grant to the sub-charterers.

It is said, however, on behalf of the charterers, that the reason why they were unable to give the sub-charterers the continued use of the vessel was that the latter had themselves obtained a charterparty of the vessel from the owners. It is true that on September 25, 1920, the sub-charterers obtained a charterparty of the steamship from the owners. On what principle, however, can it be said that this placed the charterers in any better position than they in fact occupied? They were already in this position that their charterparty from the owners would terminate on September 29, 1920. They would then cease to have any rights in the vessel. On that date the vessel came into the market. There was no obligation on the owners not to grant, or on the sub-charterers

not to accept, a charter of the vessel. The charterers had no power to prevent the sub-charterers or anybody else from making a bargain with the owners for the sale or chartering of the vessel. They were no longer in a position to obtain the vessel for themselves. They could not produce her in order to give the sub-charterers the use of her. They would have been in that difficulty even if the owners had not chartered the vessel to the sub-charterers.

The charterers, therefore, were not in a position after September 29, 1920, to get any freight in respect of the steamship from the sub-charterers or at all. That being so, they could not have earned the profits mentioned by the umpire, and they were not entitled to damages for the loss of these profits.

I therefore think that the question raised by the special case should be answered in the negative. I hold that the charterers are not entitled to recover the damages which they claim from the sub-charterers.

Solicitors for sub-charterers : *Botterell & Roche, for Woodhouse, Chambers & Co., Hull.*

Solicitors for charterers : *Downing, Handcock, Middleton & Lewis.*

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Nov. 9, 10; *Dec.* 9.

[IN THE COURT OF APPEAL.]

ARIADNE STEAMSHIP COMPANY, LIMITED *v.* JAMES McKELVIE AND COMPANY.

[1921. A. 423.]

Principal and Agent—Charterparty—"Charterers to pay demurrage"—Signature by Charterers "as agents"—Personal Liability.

A charterparty was made "between T. H. S. & Co., agents for the owners," of a steamer "and J. McK. & Co., charterers." The steamer was to load a cargo of coal on the Tyne and proceed with it to a foreign port, and there deliver it at the rate of 1000 tons a day. If she were longer detained the "charterers to pay steamer demurrage" at the rate therein mentioned. The owner or his agent was to give the "charterers" or shippers written notice if advance freight was required. The "charterer's" account at the port of loading was to be paid when rendered, otherwise the "charterers" might deduct it on settlement of freight at the port of destination. The captain or owners were to inform "the charterers" if the ship put into a port of refuge. The "charterers" had the option of cancelling the charter if the ship was not ready to load before a certain date. The "charterers'" liability was to cease as soon as the cargo was shipped, and freight, dead freight and demurrage at the ports of loading and discharging paid. There followed a clause containing various undertakings and warranties by "the charterers," and a stipulation that "upon breach of any of the conditions and undertakings mentioned in this clause the owners shall have the right . . . . to withdraw the ship from the service of the charterers without prejudice to any claim they . . . . may have on the charterers in pursuance or for breach of this charter." The charterparty was signed: "For and on behalf of J. McK. & Co. (as agents) (S.) J. A. McK."

In an action by the owners of the steamer against J. McK. & Co. for demurrage:—

Held, by Bankes and Atkin L.JJ. (Scrutton L.J. dissenting), that the defendants having signed as agents were not liable as principals to pay demurrage, notwithstanding that they were described as "charterers" in the body of the charterparty.

Gadd v. *Houghton* (1876) 1 Ex. D. 357 approved. *Lennard* v. *Robinson* (1855) 5 E. & B. 125 disapproved.

Judgment of Bailhache J. reversed.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

By a charterparty dated October 15, 1919, it was agreed "between Thomas H. Seed & Co., Ld., agents for the owners of the good screw steamer called the *Ariadne Irene* . . . . and James McKelvie & Co., Newcastle-on-Tyne, charterers,"

1. That the said steamer should proceed to Harton Staithes, River Tyne, and there load a cargo of coal not exceeding 6800 tons nor less than 6000, and being so loaded should proceed to Genoa, Savona, Spezzia, Leghorn or Cività Vecchia as ordered before ready to sail and there deliver her cargo on being paid freight as therein mentioned.

8. The cargo was to be taken from alongside by the consignees at the port of discharge at an average rate of 1000 tons per day at Cività Vecchia weather permitting Sundays and holidays excepted provided the steamer could deliver at that rate. If she were longer detained the "charterers to pay steamer demurrage at the rate of 1*s.* 3*d.* per gross register per day and pro rata. Time to count from 24 hours after steamer's arrival at or off the port . . . . whether in berth or not. . . . . In case of strikes, lock-outs, civil commotions, or any accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage, but any detention or time lost through the effects of the war $\frac{\text{and}}{\text{or}}$ any congestion caused thereby shall be for Charterer's account. . . . ."

"9. The freight to be paid one-third if required by the owner, on signing bills of lading (ship lost or not lost), in cash, subject to a deduction of three per cent. for marine insurance and interest, owner also paying the actual cost of war risk insurance on such advance (the owner or his agent giving charterers or shippers written notice before the steamer commences loading, if any advance freight is required), and the remainder on right delivery of the cargo, in sufficient cash for steamer's ordinary disbursements at current exchange, and the balance (unless otherwise arranged between the owners and charterers) by a good and approved bill on London at three months' date, or in cash equal thereto at captain's option. . . . . The charterer's account at port of loading to be paid when rendered, otherwise the charterers may deduct it on settlement of freight at port of destination together with a charge of three per cent. and the actual cost of war risk

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insurance on the amount of the account, to cover all charges including insurance and interest."

"11. In case of average, the same to be settled according to York-Antwerp Rules, 1890, and as if the steamer were British. Should the steamer put into any port or ports leaky or with damage, the captain or owners shall without delay inform the charterers thereof.

"12. Should the steamer not be ready to load from any cause before 6 A.M. on October 31, 1919, ... charterers to have the option of cancelling this charterparty, such option to be declared on notice of readiness being given.

"13. The charterers' liability shall cease as soon as the cargo is shipped and the advance of freight, dead freight, and demurrage at the ports of loading $\frac{\text{and}}{\text{or}}$ discharging (if any) paid, the owner having a lien on cargo for freight and average."

"16. The brokerage of five per cent. is due to Thomas H. Seed & Co., Ld., $\frac{1}{3}$ of which to James McKelvie & Co. on the cargo being loaded.

"17. (written in) Charterers to have the option of discharging at the rate of 800 tons per day at Genoa, Savona, Spezzia, or Leghorn in which case freight to be" as therein provided.

There followed certain special clauses headed A to E inclusive. Clause A declared: "It is a condition of this charter and the charterers undertake that:—" The clause contained various undertakings and warranties by the charterers and concluded with the words: "Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers without prejudice to any claim they, the owners, may have on the charterers in pursuance or for breach of this charter." Clause E stated that the charter was subject to the steamer being granted a licence for the voyage. The following typewritten sentence was added: "The licence for above cargo is granted."

The charterparty was signed: "By authority of owners

For Thos. H. Seed & Co., Ltd. (s) A. D. Cadogan. As Agents 15/10/19.

"For and on behalf of James McKelvie & Co. (as agent). (1) (s) J. A. McKelvie."

In accordance with the charterparty the *Ariadne Irene* loaded a cargo of 6004 tons of coal. She was ordered to Cività Vecchia and arrived there at 7.35 A.M. on November 5, 1919. The discharge of the cargo was not completed until 11.15 A.M. on November 23. The shipowners brought this action against Messrs. James McKelvie & Co. on the charterparty and claimed nine days' demurrage at 271*l.* 12*s.* 6*d.* a day, in all 2444*l.* 12*s.* 6*d.*

The defendants pleaded that they made the charterparty as agents for a firm of Brandt Pagnini of Rome and not otherwise, and that they were not personally liable upon it.

The defendants, who were coal merchants, had sold to Messrs. Brandt Pagnini a cargo of coal free on board on the Tyne and by arrangement with that firm had chartered the *Ariadne Irene* to load and carry the coal. At the date of the charterparty the Coal Controller only permitted cargoes of coal to be sent abroad on f.o.b. terms, and licences for export were required giving the name of the consignee. A bill of lading dated October 23, 1919, was made out to the order of Brandt Pagnini and was signed on behalf of the master by the plaintiffs' agent who negotiated the charterparty. Bailhache J. found as a fact that the plaintiffs knew when the charterparty was signed that the cargo was sold on f.o.b. terms.

The learned judge gave judgment for the plaintiffs.

The defendants appealed.

R. A. Wright K.C. and *S. L. Porter* for the appellants. The appellants are not personally liable upon this charterparty. They have executed it "as agents" and that is enough to show that they did not undertake the liability of principals: *Gadd* v. *Houghton*. (2)

Even before that case the form in which a document was

(1) Or "(as agents)." The writing was not clear. (2) 1 Ex. D. 357.

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signed outweighed the description of a party in the body of the document: *Tanner* v. *Christian* (1); *Cooke* v. *Wilson* (2); *Parker* v. *Winlow* (3); in each of which an unqualified signature rendered the party personally liable notwithstanding words in the body of the document showing that he contracted in a representative capacity. But whatever may have been the law before, since *Gadd* v. *Houghton* (4) the current of authority set definitely towards absolving from personal liability one who signs a document "as agent for" or "on account of" another. *Deslandes* v. *Gregory* (5) was an earlier case, and *Miller* v. *Smith* (6) a later case to the same effect. Bailhache J. followed *Lennard* v. *Robinson* (7); but that case and *Weidner* v. *Hoggett* (8) are both inconsistent with *Gadd* v. *Houghton* (4), and should no longer be regarded as authorities: see 2 Smith's Leading Cases. (9) The same may be said of *Paice* v. *Walker* (10), which was disapproved by James L.J. in *Gadd* v. *Houghton.* (4) The word "charterers" is ambiguous. Merchants may and often do charter ships as agents for others. Where a charterparty was signed without qualification by A. B., who was described in the body of the charterparty as "charterer," evidence was admitted to show that he was not the principal in the matter, but that he had chartered the ship on behalf of the plaintiffs n the action: *Fred. Drughorn, Ld.* v. *Rederiaktiebolaget Transatlantic.* (11) The description of the appellants as "charterers" is not strong enough to rebut the inference from their signature "as agents" that they never intended to be personally liable on this charterparty.

E. A. Digby (*Leck K.C.* with him) for the respondents. The argument for the appellants gives undue importance to the signature of a document. The signature is no doubt important, but it is not conclusive. If clause 8 of this

(1) (1855) 4 E. & B. 591.
(2) (1856) 1 C. B. (N. S.) 153.
(3) (1857) 7 E. & B. 942.
(4) 1 Ex. D. 357.
(5) (1860) 2 E. & E. 602.
(6) [1917] 2 K. B. 141.
(7) 5 E. & B. 125.
(8) (1876) 1 C. P. D. 533.
(9) Notes to *Thomson* v. *Davenport* (1829) 9 B. & C. 78, 9th ed. (1887), p. 419; 12th ed. (1915), pp. 377, 378.
(10) (1870) L. R. 5 Ex. 173.
(11) [1919] A. C. 203.

charterparty had been in this form "James McKelvie & Co. to pay steamer demurrage," etc., they would have been personally liable, notwithstanding that they signed the charterparty as agents. *Lennard* v. *Robinson* (1); *Paice* v. *Walker* (2); *Weidner* v. *Hoggett* (3); and *Hutcheson* v. *Eaton* (4) are all cases where a personal liability appearing in the body of the document was unaffected by a signature as agent for, or on behalf of, another.

It would have made no difference if the parties had been described as "Thomas H. Seed & Co., Ld., ... and James McKelvie & Co., hereinafter called the charterers . . . . " and clause 8 had provided, as it does: "Charterers to pay steamer demurrage." The appellants would have been personally liable notwithstanding the form of their signature. It can surely make no difference that the appellants are described as "James McKelvie & Co., charterers." When clause 8 says "Charterers to pay steamer demurrage" it can only mean "James McKelvie & Co. to pay steamer demurrage." To whom is notice to be given under clause 9 if advance freight is required? To whom is the captain to give notice under clause 11 if the ship puts into a port of refuge? Who is meant by the "charterers" in clauses 12, 13, and 17? Clearly the answer to all these questions is "the appellants." *Drughorn's Case* (5) is really not to the contrary. It was only an example of the maxim that parol evidence may be adduced to charge a principal; but it is not admissible to discharge one who, though an agent, contracts as a principal: *Higgins* v. *Senior*. (6) No attempt was made in *Drughorn's Case* (5) to discharge Lundgren, the "charterer" in that case. On the contrary Lord Sumner expressly says: "Lundgren as charterer, albeit on behalf of others, was personally liable to perform the obligations which the contract imposed on the charterers." In the present case the appellants are attempting to discharge themselves though they have contracted as principals. If

(1) 5 E. & B. 125.
(2) (1870) L. R. 5 Ex. 173.
(3) (1876) 1 C. P. D. 533.
(4) (1884) 13 Q. B. D. 861.
(5) [1919] A. C. 203.
(6) (1841) 8 M. & W. 834.

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it had been agreed that though apparently principals, they were not to be sued as such, that might have been matter for a plea on equitable grounds: *Wake* v. *Harrop*. (1) In order to hold that the appellants are not liable on this charterparty it will be necessary to overrule that case, a decision of the Court of Exchequer affirmed in the Exchequer Chamber.

[SCRUTTON L.J. referred to *Brandt* v. *Morris*. (2)]

S. L. Porter in reply.

Cur. adv. vult.

Dec. 9. The following written judgments were delivered.

BANKES L.J. This appeal raises the much discussed question whether an agent has, by the form of language used in a particular document, sufficiently protected himself against personal liability. The question must always resolve itself into a question of construction of the document in question. Decided cases, therefore, except where the language of two documents is practically identical, can serve only as guides, and not as authorities. In dealing with any particular case it seems to me material to determine first of all whether the words relied on as relieving an agent of personal liability are merely words of description, or whether they are words of qualification. If the former, then no effect can be given to them. If the latter, then the document must be read as a whole for the purpose of ascertaining whether the qualification is sufficiently expressed to govern the document. In dealing with this last point, I think that the form in which the signature to a document is expressed should have great weight attached to it, because it is by the signature that the party expresses his consent to the terms of the document. If the consent is expressed with the qualification that it is given only as agent, I think that it must require very strong and plain language in the body of the document to get rid of that qualification and to establish that the agent really intended to make himself personally liable on the document in spite of the form in which the signature is

(1) (1861) 6 H. & N. 768; (1862) 1 H. & C. 202.
(2) [1917] 2 K. B. 784.

expressed. In some of the decided cases no special attention appears to have been paid to the question whether the words of qualification were annexed to the signature or appear in the body of the document. My own view is that it is a sound rule of construction, applicable to cases like the present, that where the signature is unqualified the presumption is that the agent is personally liable, but that where sufficient words of qualification are annexed to the signature to indicate that the person signing signs as agent the presumption is the other way. No doubt the presumption in either case may be rebutted, and it must always be a question of construction merely whether, taking the document as a whole, the presumption is or is not rebutted. This view is, I think, quite in accordance with the decided cases, some of which are decisions in reference to charterparties and some in reference to contracts in writing other than charterparties.

In *Tanner* v. *Christian* (1), decided in the year 1855, the contract was signed by the agent in his own name, and the Court, consisting of Lord Campbell C.J. and Wightman and Crompton JJ., found nothing in the body of the document to displace the presumption of personal liability, although the agent was described as a party "for and on behalf of" a named person. In giving judgment in that case Wightman J. said that one test for ascertaining whether a person acting for and on behalf of another has contracted so as to bind himself personally is to see who by the provisions of the contract is to act in the performance of it. The Court in that case did place reliance on certain provisions in the contract as indicating an intention that the agent should be personally bound; but both Lord Campbell and Crompton J. lay special stress upon the fact that the agent signed in his own name without qualification.

Lennard v. *Robinson* (2), also decided in 1855, by a Court consisting of Lord Campbell C.J., Coleridge and Erle JJ., was a charterparty case. It was upon the decision in this case that Bailhache J. founds his judgment. The charterparty in that case commenced thus: "It is this day mutually

(1) 4 E. & B. 591. (2) 5 E. & B. 125.

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agreed between Mr. John M. Lennard, owner," etc., "and Messrs. Robinson and Fleming of London, merchants"; and it was signed: "By authority of, and as agents for, Mr. A. H. Schwedersky of Memel. Pro Robinson & Fleming; Wm. F. Malcolm." In his argument the counsel for the plaintiff laid great stress upon the special form in which the document was signed. He interpreted it as meaning only that the principal authorized Messrs. Robinson & Fleming to make the contract in the form in which it was made; that is as between the plaintiffs and the defendants on their own behalf. Lord Campbell appears to have accepted this argument. He says (1): "Looking at the whole of the contract itself, I think the defendants are made personally liable. There is nothing in the signature to prevent them from being so. In the body of the contract, they are contracting parties; and they may well become so 'by authority of, and as agents for,' their employer: that is, he may be made liable to them. That, however, does not alter the effect of the instrument by which they become contracting parties as between themselves and the plaintiff." Coleridge and Erle JJ. give no grounds for their decision, though the former attaches importance to the fact that the alleged principal was a foreigner. I cannot regard this as a decision in reference to a contract signed by a person "as agent" without more. It appears to me to be a decision in reference to the special language of the particular document.

Parker v. *Winlow* (2), decided in 1857, was also a charterparty case, where the charterparty, though expressed to be made between Parker and Winlow, agent for E. Winlow & Son, was signed by Winlow without restriction. The judgments of Erle and Crompton JJ. appear to me to strongly support the view I have ventured to express. The former says: "I agree that the defendant has bound himself. He says that he is agent for E. Winlow & Son; but that is not enough to rebut the inference of personal liability arising from the rest of the contract." The latter said: "Mere words of description attached to the name of a contractor,

(1) 5 E. & B. 130. (2) 7 E. & B. 942, 948, 949.

such as are used here, saying he is agent for another, cannot limit his liability as contractor. A man, though agent, may very well intend to bind himself; and he does bind himself if he contracts without restrictive words to show that he does not do so personally. It is important that mercantile men should understand that, if they mean to exclude personal recourse against themselves on contracts which they sign, they must use restrictive words, as if they sign per procuration, or use some other words to express that they are not to be personally liable."

Deslandes v. *Gregory* (1) is another charterparty case. There the contract was expressed to be between the plaintiff and the defendants, "as agents to Samuel Ferguson," and was signed by the defendants "as agents." All three judgments in that case support the view I am taking, but the judgment of Hill J. in the Court below and of Williams J. in the Exchequer Chamber are so much in point that I read them. Hill J. says: "The point seems to me to be determined by the form of the signature to the charterparty, which is, in effect, the signature of Ferguson, by Gregory Brothers, as his agents, not the signature of Gregory Brothers, binding them personally. The description of the defendants in the introductory part of the charterparty, as Ferguson's agents, is ambiguous, and might not, taken alone, have been sufficient to exclude the defendants' personal liability; but the signature clearly shows that the intention of the parties was that Ferguson should be the party to the contract; hence, the signature of the defendants imposes no further obligation upon them than that implied by law, namely, that they had authority, as agents, to bind Ferguson." Williams J. says: "We are all of opinion that the judgment of the Court of Queen's Bench was right. The form of the charterparty and the mode of signature, taken together, are decisive to show that the defendants did not bind themselves by the contract as principals. They sign 'For Samuel Ferguson, Esq., of Anamaboe, Gregory Brothers, as agents.' It would

(1) 2 E. & E. 602.

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require extremely plain words in the body of the contract to control the effect of that mode of signature, and no such words are to be found there, the contract purporting to be made by 'Messrs. Gregory Brothers, as agents to Samuel Ferguson of Anamaboe, merchants and charterers.' The only argument that can be relied upon by the appellant is that the words 'merchants' and 'charterers' are in the plural; but this evidently happened by mistake, and the words occur, moreover, in the printed part of the charterparty."(1) It must be noted that a very strong Court found no difficulty in that case in reading the clauses in the charterparty dealing with the obligations of the charterer as applicable to the defendants' principal, even though he was, according to the report, "a black man resident and trading on the coast of Africa." The charterparty in that case provided for notice of the vessel's being ready to load or to discharge being given to the charterers or their agents. I see no difficulty, in a case where an agent attempts to exclude any personal liability by signing as agent, in reading those clauses in the charterparty which impose a personal liability upon the charterer as referring to the agent's principal and those clauses which refer to the giving of notices as referring to the principal or his agent. I do not find any charterparty case where an agent signed "as agent" merely in which the Court has held that the references in the body of the charterparty to obligations undertaken by the charterers are sufficient to negative the contention that the agent was not personally liable.

Gadd v. *Houghton* (2) was not a charterparty case, but it is a decision which has been very generally approved of and which contains very strong expressions of judicial opinion with regard to the qualification of a signature. In that case the qualification relied on was in the body of the document, and the signature was without qualification. The Court held that the words in the body of the document were sufficient to exclude the personal liability of the agent; but in reference to the expression "as agents" and to the

(1) 2 E. & E. 611. (2) 1 Ex. D. 357.

importance of the form of the signature several of the members of the Court expressed a strong opinion. James L.J. (1) says this: "As to *Paice* v. *Walker* (2), I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea." Quain J. says: "It seems extraordinary that there should be any doubt whether this binds the principal or the agent. It is said that in order to relieve the agent from liability, he must sign 'as agent' or 'on account of' Morand & Co. I cannot see the necessity for adding those words to the signature if you can gather from the contract that he makes it on account of Morand & Co." And Archibald J. says: "The usual way in which an agent contracts so as not to render himself personally liable is by signing as agent." *Gadd* v. *Houghton* (3) must, I think, be treated as containing the rule of construction to be applied where an agent signs a contract such as the one in that case "as agent." In the present case the document under consideration is a charterparty. The agent is described in the body of the document as the charterer, but he signs "as agent." If it is correct to consider that a signature "as agent" controls the entire document, unless a clearly expressed intention to the contrary appears, I do not find anything in the charterparty under consideration which is, in my opinion, a sufficient expression of such an intention. I do not think that the authorities dealing with cases of charterparties to which I have referred are opposed to this view, and I think that it is to the interest of the commercial community generally that a signature "as agent" should have a generally accepted meaning as a deliberate expression of intention to exclude any personal liability of the signatory, and that in reference to the meaning to be attributed to such a signature a distinction should not be drawn between classes of contracts, nor should it be considered necessary to search each clause in a possibly long and complicated printed document in order to discover some ambiguous

(1) 1 Ex. D. 359, 360, 361. (2) L. R. 5 Ex. 173.
(3) 1 Ex. D. 357.

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expression on which to found an argument that the parties intended that the agent should be personally liable. I differ on such a matter with so very experienced a judge as Bailhache J. with considerable hesitation, but I do not feel the difficulty he felt in relation to the provision for giving notice to the charterer which would, as it seems to me, be complied with by giving notice to the person whom the principal appointed as his agent with authority to describe himself as charterer though at the same time limiting his personal liability; nor, for the reasons which I have endeavoured to explain, do I share the learned judge's view in drawing the distinction which he suggests may well be drawn between charterparties and contracts made by brokers.

There are, of course, certain classes of documents such as cheques, bills, and promissory notes to which the considerations as to signing "as agent" do not apply. I only mention this fact in order to make it clear that nothing that I have said in this judgment applies to such documents as these. For the reasons I have given I think that the appeal succeeds and the judgment must be set aside and entered for the defendants with costs here and below.

SCRUTTON L.J. The charterparty in this case began: "It is this day agreed between Thomas H. Seed & Company, Ld., agents for the owners of the good screw steamer called the *Ariadne Irene* and James McKelvie & Company, Newcastle-on-Tyne, Charterers." It was signed, "By authority of owners, for Thomas H. Seed & Co., Ld., A. D. Cadogan, as Agents," and, "For and on behalf of James McKelvie & Company, as agent"—(or "agents"—the writing is not clear)—"J. A. McKelvie." The owners of the steamer, the Ariadne Steamship Co., then sued James McKelvie & Co. as charterers for demurrage, which, by the charter, was to be paid by "charterers." The defendants contended they were not liable, as they were only agents without personal liability. Bailhache J. decided against them on the authority of *Lennard* v. *Robinson* (1), which is very similar in its facts.

(1) 5 E. & B. 125.

The defendants appeal, contending amongst other things that *Lennard* v. *Robinson* (1) was wrongly decided. The argument before us let loose the bewildering number of authorities with which all who have experience of this branch of the law are acquainted. After hearing them, Parker J. in *Chapman* v. *Smith* (2) was driven to say that he need not consider them in detail, as the question was in each case a question of construction having regard to the surrounding circumstances. This, of course, makes any one case of very little use as a guide how the Court will decide another case, but is a tempting conclusion when one considers the conflicting character of the decisions reported. If it is possible to find any principles that should guide future controversies, the attempt should be made.

Prima facie the persons liable on a written contract, the parties to it, should be discovered from the writing itself. It is possible, however, to add by oral evidence the liability of a party to that of the party named in the instrument, as where evidence is given to bind an undisclosed principal of the named party, but in such a case the named party remains liable even if the other party knew he was an agent. Both the undisclosed principal and his agent described as a party may be liable: see the well-known case of *Higgins* v. *Senior*. (3) It is possible also, according to *Wake* v. *Harrop* (4), to discharge a person stated as a party in an instrument by evidence that it was orally agreed between the parties that he should not be liable but his principal should, though the members of the Court did not agree whether it was a good defence in law, or only in equity. Wilde B., following *Lennard* v. *Robinson* (1), thought it was a bad plea in law Bramwell B., who thought it was a good plea in law, distinguished *Lennard* v. *Robinson* (1), inasmuch as in that case there was only knowledge of agency, and this was consistent with the agent's taking a personal liability; no agreement that he should not be liable was alleged.

(1) 5 E. & B. 125.
(2) [1907] 2 Ch. 97, 103.
(3) 8 M. & W. 834.
(4) 6 H. & N. 768; 1 H. & C. 202.

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The House of Lords in *Drughorn's Case* (1) allowed evidence to be given to add the liability and rights to sue of an undisclosed principal of a person described as "charterer" on the ground that a person described as "charterer" might yet be an agent, but Lord Sumner expressly states that the person described as "charterer," though he proved an undisclosed principal, "was personally liable to perform the obligations which the contract imposed on the charterers." The old form of cesser clause expressly provided that as the charterer entered into the charter on behalf of another his liability as charterer ceased on the happening of certain events, recognizing that many shippers of cargo appeared as charterers on the terms that they should cease to be liable when they had shipped the cargo. On principle it seems to me that there are two places in the contract of special importance in ascertaining who is personally liable on it. The first is the description of the parties to the contract; the second is the form in which they assent to the contract by affixing their signature. Where in both cases they describe themselves as agents, it is almost impossible they should be held liable, except in the case of deeds. Where in neither case do they qualify their liability, it is almost impossible they should escape liability. What is to happen where they assume personal liability in the one place and describe themselves as agents in the other? It appears to me, to use the words of Archibald J. in *Gadd* v. *Houghton* (2), you must be able to gather that "they contracted only as agents," that is that they undertake no personal liability, but merely as agents effect a contract on which their principal is the only contracting party. Mellish L.J. in *Gadd* v. *Houghton* (2) treated an unqualified signature as prima facie implying liability, and requiring "something very strong on the face of the instrument to show that the liability does not attach to him." The same view was stated by the majority of the Court of Appeal in *Brandt* v. *Morris*. (3) The facts which displaced the strong prima facie presumption in *Gadd* v.

(1) [1919] A. C. 203. (2) 1 Ex. D. 357.
(3) [1917] 2 K. B. 784.

Houghton (1) were that the purchaser told a broker in Liverpool to telegraph out (to Spain) an order on his account for oranges of the brand James Morand, f.o.b. The broker telegraphed out the offer to James Morand and received an acceptance. So far the transaction was clearly between the buyer and James Morand. The broker then sent a sold note to the buyer: "We have this day sold to you on account of James Morand & Co.," and signed without qualification. The Court held that the transaction so effected displaced the presumption, and the first letter of the buyer seemed to exclude any idea of a contract with the broker.

I am of opinion that unqualified description as a party to the contract is at least equally strong as importing personal liability as unqualified signature, unless negatived by very strong language in the rest of the contract, and that a later description as agent does not necessarily exclude personal liability, particularly when the person described as a party is himself going to perform some of the duties of a charterer. It is true that the signature assenting to the terms of the contract is affixed "as agent," but it assents to the terms of a contract in which the writer is described as a party to the contract. The person supplying and loading the cargo and to whom telegraphic advice of readiness to load is addressed is frequently the person described as charterer; and it was for his benefit that the cesser clause in its original form was inserted to free him from his original liability when he had completed the shipping of the cargo, a lien on which would provide security for the performance of the rest of the obligations. This position of shippers undertaking the first obligations of charterers has been recognized in numerous cases which I gather we are invited to overrule. In *Cooke* v. *Wilson* (2) the charter was made between Wilson and Cooke on behalf of the Geelong and Melbourne Railway Company to ship goods in England and deliver them to Geelong in Australia and signed in Cooke's name without qualification. Cooke was held a party and liable, as there were things in the charter he was to do, and the description did not exclude his personal

(1) 1 Ex. D. 357. (2) 1 C. B. (N. S.) 153.

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liability. *Lennard* v. *Robinson* (1) was decided by the Queen's Bench in 1855. Robinson & Fleming, merchants, were one of the named parties to the contract and signed by authority of and as agents for Mr. A. H. Schwedersky of Memel. The charter contained a number of terms that "merchants" should perform, and again the description as a party to the contract was held sufficient in spite of the signature. In *Parker* v. *Winlow* (2), in 1857, the charter was between Parker and G. W. Winlow, agent for E. Winlow & Son, and was signed by G. W. Winlow in his own name. Martin B. and the Court of Queen's Bench held G. W. Winlow liable, Lord Campbell saying that a man might pledge his personal liability though he was agent, as both agent and personally liable. These cases are decided on the lines on which Bailhache J. decided the present case. He also refers to the terms of the charter in this case which the defendant would be concerned with, shipment and sailing telegram, and he follows *Lennard* v. *Robinson*. (1) He adds a remark with which I entirely agree: "I may perhaps add that in my opinion it requires clearer words of intention to exonerate a merchant who allows himself to be described in a charterparty as charterer from personal liability than are necessary in contracts made by brokers who may be presumed from the very fact of their calling to be acting as agents merely and not as principals." I also think that when the facts of *Gadd* v. *Houghton* (3), a case of broker's liability, are appreciated, it is quite unnecessary to conclude that the Court of Appeal meant to lay down a principle which would overrule at least three decisions on a different form of business, which had then stood for twenty years without question.

For these reasons I concur in the judgment of Bailhache J. and think the appeal should be dismissed with costs.

ATKIN L.J. This case raises anew the question as to the effect to be given to the words "as agents" qualifying the signature to a written agreement. In the present case the dispute arises over a charterparty, but a charterparty differs

(1) 5 E. & B. 125. (2) 7 E. & B. 942.
(3) 1 Ex. D. 357.

not from any other contract in respect of the principles applying to its formation and construction and I apprehend the dispute must be determined on principles common to contracts as a whole. A contract in writing appears to be a term capable of more than one meaning. The parties may agree verbally and subsequently may reduce the terms of their agreement into writing. If that is their intention the terms can only be ascertained by the construction of the writing. The assent of the parties to those terms, if they have not signed the document, may be proved by parol evidence. If the parties have signed it, or if the document itself constitutes the contract—i.e., if the parties only arrive at a consensus ad idem by assenting to the written terms by adding their signature as a part of the document—their assent is conclusively proved by the signature. The terms of the contract to which they have assented will be ascertained from the body of the document. One of the material terms is the identity of the parties between whom it is made, and this term may be only apparent from the signature. "We mutually agree, etc., signed A. and B." shows that the parties to the agreement are the two signatories. But when the assent of the party sought to be charged is proved, it matters not what the terms of the contract expressed in the body of the document may be. Signature unconditionally appended is proof of unconditional assent to the terms recorded in the body of the contract. If the body of the contract records that the signer is a party, or leaves the name of the party to be inferred from the signature, the signature will be proof that the signer has assented to a contract made with him. The contract may, however, record that the contract is made between A. and B. acting by his agent C. and may be signed by C., in which case C. has assented to a contract between A. and not C. but C.'s principal B. But the assent signified by the signature may be qualified so as to show that the signer is not assenting unconditionally to the contract, but is assenting in a representative capacity on behalf of a principal. "B. by C. his attorney" written by C. is plainly an assent only by B. "C. on behalf of B." is, I think, equally plainly an assent

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of C. to the contract not so as to bind himself but to bind B. If the assent to the contract clearly appears from the form of the signature to be qualified, it appears to me to be impossible to charge the signer on the footing that there is an unqualified assent by him. Thus in the two instances given above, "B. by C. his attorney," or "C. on behalf of B.," it would seem irrelevant that the body of the contract expressed the contract to be made between A. and C. C. has not assented to such a contract. On the other hand the party signing may append words to his signature which leave it doubtful whether he intends an unqualified assent; e.g., C. may sign, "C. broker," or "C. agent." In such a case you must look to the body of the contract to see whether C. was intended to be a party or not. If the contract does not purport to be made with him, but with some one else, or uses words which make it plain that the only contracting party is C.'s principal, disclosed or undisclosed, C. will not be chargeable.

Some confusion, I think, has been introduced into the cases by not sufficiently distinguishing between cases of construction of the body of the contract and cases turning on the proof of assent in the signature. There can be little doubt that the law on the matter has not been uniformly stated and that it has required some time to settle it. What words in the body of the contract are sufficient to negative personal liability, and what words qualifying signature are sufficient to negative assent as principal were, up to 1876, in doubt. But since June, 1876, when the case of *Gadd* v. *Houghton* (1) was decided in the Court of Appeal by James, Mellish and Baggallay L.JJ. and Quain and Archibald JJ., I have always understood the law to be that the words "on account of" and the words "as agents" are conclusive, when qualifying the signature to negative liability as principal, and that whether the actual principal is disclosed or not. If there is a principal the principal is bound; if not, the agent may be liable for breach of warranty of authority, but not otherwise. If used in the body of the document they are very strong to negative liability, but as you must read the document as a whole you may

(1) 1 Ex. D. 357.

possibly find other words and clauses so plainly indicating personal liability that they outweigh the words in question. As qualifying signature, however, they have been used for thirty-five years in business transactions as negativing personal liability, and since 1876 there has been, so far as I can discover, no decision to the contrary. As is plain from cases prior to *Gadd* v. *Houghton* (1) and from the judgment of Archibald J. in that case, the qualification of the signature "as agents" had been usual before 1876 to negative personal liability. That decision merely gave it final authority. To my mind it is irrelevant to consider whether the qualifying words occur more than once in the document on the principle that "what I say three times is true," but what I say once is doubtful. If the words qualify the signature they qualify the assent and nothing more matters. It follows from what I have said that in my opinion the case of *Lennard* v. *Robinson* (2), decided in the year 1855 while the law was still unsettled, was wrongly decided, and should no longer be treated as an authority. In so deciding I am fortified by the view expressed by the learned editors of Smith's Leading Cases (3), of whom the late Lord Collins was one, in the edition published next but one after the decision in *Gadd* v. *Houghton* (1), that *Lennard* v. *Robinson* (2) must be considered of doubtful authority.

I think, therefore, that the defendants in this case who were conceded below to have signed as agents, and whose signature, on looking at the original, I consider to be in that form, plural and not singular, were not personally liable on the contract. But if the distinction between the signature as recording assent and the body of the contract as recording the terms is not well founded, I agree entirely with the judgment of Bankes L.J. in holding that on the construction of the document as a whole the same result is arrived at. In *Deslandes* v. *Gregory* (4), where the signature to a charter-party was "For Samuel Ferguson of Anamaboa, Gregory

(1) 1 Ex. D. 357.
(2) 5 E. & B. 125.
(3) 9th ed., p. 419; 12th ed. (1915), vol. ii., pp. 377, 378.
(4) 2 E. & E. 602, 611.

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Brothers as agents," Williams J. delivering the judgment of the Exchequer Chamber said: "It would require extremely plain words in the body of the contract to control the effect of that mode of signature." As I have said, I think that now no words in the body could control it, but if they could there are no such plain words here. The words relied on in the body as to notice to the charterers of readiness to load, and so on, are words which would appear in the printed clause, though the charter, which is expressed to be a Mediterranean coal charter, had been expressly made with named foreign charterers. They would obviously be complied with by notice to the known charterers' agent in this country. If the question arose I should find it difficult to distinguish between the position of Messrs. Seed & Co., Ld., agents for undisclosed owners, and the defendants, agents for undisclosed charterers. No one, I think, would construe the charterparty as one where Messrs. Seed were contracting as owners, and in my opinion no one should hold that the defendants were contracting as charterers.

I think that the appeal should be allowed and judgment entered for the defendants with costs here and below.

Appeal allowed.

Solicitors for appellants: *Thomas Cooper & Co.*

Solicitors for respondents: *Downing, Handcock, Middleton & Lewis.*

W. H. G.

PERFORMING RIGHT SOCIETY, LIMITED *v.* LONDON THEATRE OF VARIETIES, LIMITED.

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Dec. 12, 13, 14.

Trade Union—Company formed for Protection of Copyright of Members—Restrictions on Conduct of Trade or Business of Members—Copyright—Action by equitable Assignees for Infringement—Assignors not joined as Co-plaintiffs—Right to sue—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 5, *sub-s.* 3—*Copyright Act*, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 5, *sub-s.* 3.

The plaintiffs were a company limited by guarantee, whose objects were to enforce on behalf of its members all rights and remedies of the proprietors by virtue of the Copyright Act, 1911, or otherwise in respect of the public performance of their works. Members were limited to composers, authors, publishers, or proprietors of musical, literary or dramatic works. Members who were publishers must, and the others might, assign to the company their interest in the right to perform any musical or dramatic work published by them, and the company then had the sole right to authorize or forbid the public performance of all or any of the works of the publisher, to grant licences and collect fees in respect of such public performance. Two songs, the performing rights of which had been assigned to the plaintiffs, were performed without their consent at a music-hall belonging to the defendants. In an action by the plaintiffs claiming an injunction and damages in respect of the infringement of their copyright in the songs:—

Held, (1.) that as the members of the plaintiff company were not submitting to any restrictive conditions on the conduct of their trade or business, the company was not a trade union, and its registration was therefore not void under s. 5, sub-s. 3, of the Trade Union Act, 1871. (2.) That the plaintiffs, as equitable assignees of the copyright in the songs, were entitled to maintain the action in their own name without joining their assignors as co-plaintiffs. (3.) That a certificate of incorporation given to the plaintiffs under s. 17, sub-s. 1, of the Companies (Consolidation) Act, 1908, was not conclusive so as to preclude the defendants from contending that the plaintiffs were a trade union.

ACTION tried before Branson J. without a jury.

The plaintiffs were the proprietors of the performing rights of a number of musical works, including two songs, "A Devonshire Wedding" and "Love in Lilac Time." The action was brought by the plaintiffs against the defendants for alleged infringements of the plaintiffs' copyright in the songs by performing or authorizing the performance of them at Collins's Music Hall, Islington, on November 1, 1920, without the plaintiffs' consent.

There was an alternative claim under s. 2, sub-s. 3, of the Copyright Act, 1911, for permitting the hall to be used for the

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said performance. By their defence the defendants alleged that the plaintiffs were a trade union within the meaning of the Trade Union Acts, 1871 to 1913, and that their registration and incorporation as a limited company was therefore void under s. 5, sub-s. 3, of the Trade Union Act, 1871. (1) The defendants further alleged that they had no reasonable ground for suspecting that the performance of the works would be an infringement of copyright. The plaintiff company was a company limited by guarantee, and its objects as set forth in the memorandum of association were: "To exercise and enforce on behalf of members of the company, being composers of any musical works or the authors of any literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (hereinafter called the proprietors), all rights and remedies of the proprietors by virtue of the Copyright Act, 1911, or otherwise in respect of the public performance of their works."

On behalf of the defendants evidence was called to show that the persons who performed the songs on the occasion in question had obtained the authority or consent of the plaintiffs. The effect of the evidence is stated in the judgment. The plaintiffs claimed an injunction to restrain the defendants from further infringing their copyright in the songs, and damages.

Barrington-Ward K.C. and *Henn Collins* for the plaintiffs. The plaintiffs are entitled to maintain this action against the defendants for an injunction and damages for infringement of the plaintiffs' interest in the copyright in the works in question. There was a valid equitable assignment to the

(1) The Trade Union Act, 1871, s. 5, sub-s. 3, "The Companies Acts, 1862 and 1867, shall not apply to any trade union, and the registration of any trade union under any of the said Acts shall be void. . . . ."

Copyright Act, 1911, s. 5, sub-s. 3, "Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly."

plaintiffs of that part of the copyright in the works in question which constitutes the performing rights in these songs : *Erskine Macdonald, Ld.* v. *Eyles* (1) ; *Tailby* v. *Official Receiver* (2) ; *Ward, Lock & Co.* v. *Long* (3) ; *British Actors Film Co.* v. *Glover* (4) ; and *Barker* v. *Stickney.* (5)

Being equitable assignees of the performing rights in the works, they are, as respects these rights, the " owners " of the copyright in the works within the meaning of s. 5, sub-s. 3, of the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46). That being so, the plaintiffs are entitled to maintain this action in their own name without joining their assignors, because s. 6, sub-s. 1, of that Act provides that where copyright in any work has been infringed, the owner of the copyright shall be entitled to all the remedies conferred by law for the infringement of a right.

The plaintiffs had the sole right to " authorize " the performance of these songs within the meaning of s. 1, sub-s. 2, of the Act of 1911, and the defendants by purporting to authorize the performance of them infringed the plaintiffs' copyright : *Marsh* v. *Conquest* (6) ; *Monaghan* v. *Taylor* (7) ; *Fenning Film Service* v. *Wolverhampton, Walsall and District Cinemas* (8) ; and see *Lyon* v. *Knowles* (9) and *Russell* v. *Briant.* (10)

The defendants committed an " infringement " of the plaintiffs' copyright in these songs within the meaning of s. 2, sub-s. 3, of the Act of 1911, by permitting their premises to be used for the performance of the songs for their private profit : see *Duck* v. *Bates* (11) and *Glenville* v. *Selig Polyscope Co.* (12)

The plaintiffs are not an illegal society as being in restraint of trade and creating a monopoly : *Performing Right Society* v. *Thompson* (13) ; *Attorney-General of Australia* v. *Adelaide*

(1) [1921] 1 Ch. 631.
(2) (1888) 13 App. Cas. 523.
(3) [1906] 2 Ch. 550.
(4) [1918] 1 K. B. 299.
(5) [1919] 1 K. B. 121.
(6) (1864) 17 C. B. (N. S.) 418.
(7) (1886) 2 Times L. R. 685.
(8) [1914] 3 K. B. 1171.
(9) (1863) 3 B. & S. 556 ; (1864) 5 B. & S. 751.
(10) (1849) 8 C. B. 836.
(11) (1884) 13 Q. B. D. 843.
(12) (1911) 27 Times L. R. 554.
(13) (1918) 34 Times L. R. 351.

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Steamship Co. (1); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2)

Even if some of the plaintiffs' rules are in restraint of trade, that does not render the society illegal, because its main objects are lawful: per Lindley L.J. in *Swaine* v. *Wilson.* (3)

It is not true to say that the plaintiff company are a trade union, and that their registration as a company is therefore void under the Trade Union Act, 1871, s. 5, sub-s. 3. The plaintiffs are not a "trade union" within the definition of that expression in s. 16 of the Trade Union Act, 1876, and s. 2, sub-s. 1, of the Trade Union Act, 1913: see *Aberdeen Master Masons' Incorporation* v. *Smith* (4); *Edinburgh, &c., Aerated Water Manufacturers' Defence Association* v. *Jenkinson & Co.* (5); *Dallimore* v. *Williams* (6); *Swaine* v. *Wilson* (7); *Jones* v. *North.* (8)

Disturnal K.C., Cyril Atkinson K.C. and *Clement Davies* for the defendants. The plaintiffs are a trade union within the meaning of the Trade Union Acts, 1871 to 1913, and their registration was therefore void under s. 5, sub-s. 3, of the Trade Union Act, 1871. The defendants are entitled to rely upon this defence notwithstanding the production by the plaintiffs of their certificate of incorporation: *British Association of Glass Bottle Manufacturers* v. *Nettlefold.* (9) Some of the objects of the plaintiff company are in restraint of trade, and the rules impose restrictive conditions upon the members in the conduct of their trade or business. The plaintiffs therefore come within the definition of a "trade union" in s. 23 of the Trade Union Act, 1871, and s. 1, sub-s. 2, of the Trade Union Act, 1913. There are authorities which show that the definition has a wide operation. Secondly, the plaintiffs are not entitled to maintain this action, as they are only equitable assignees and not legal owners of the performing rights in these songs. The right persons are not before the

(1) [1913] A. C. 781, 793, 797.
(2) [1892] A. C. 25.
(3) (1890) 24 Q. B. D. 252, 261.
(4) 1908 S. C. 669.
(5) (1903) 5 F. 1159.
(6) (1912) 29 Times L. R. 67.
(7) 24 Q. B. D. 252.
(8) (1875) L. R. 19 Eq. 426, 430.
(9) (1911) 27 Times L. R. 527.

Court. The assignors ought to have been joined: *Colburn* v. *Duncombe*. (1) The assignment of future interests gave a perfect right inter partes, but it does not entitle the plaintiffs to maintain the present action in their own name: *Tailby* v. *Official Receiver*. (2) There is no evidence that the defendants had any notice of the assignment to the plaintiffs. The defendants had no reasonable ground for suspecting that the performance of the songs would be an infringement of the copyright, and the case therefore falls within s. 2, sub-s. 3, of the Copyright Act, 1911.

Barrington-Ward K.C. in reply. All the performing rights have been assigned to the plaintiffs, and they are entitled to sue independently of the assignors: *Brandt & Co.* v. *Dunlop Rubber Co.* (3) It is immaterial that the plaintiffs' title is only equitable: *Sweet* v. *Cater*. (4) So long as the certificate of incorporation stands, it is conclusive evidence of the validity of the plaintiff company: *Hammond* v. *Prentice Brothers*. (5) The plaintiffs do not partake of the nature of a trade union. They are engaged in selling their musical output, and are not controlling the trade or business of their members.

Cur. adv. vult.

Dec. 14. BRANSON J. read the following judgment: In this action the plaintiffs, the Performing Right Society, Ld., sue the defendants, the London Theatre of Varieties, Ld., in respect of alleged infringements of the plaintiffs' copyright in two songs, "A Devonshire Wedding" and "Love in Lilac Time," by performing and/or authorizing the performance thereof in public at Collins's Music Hall, Islington, on November 1, 1920. There is an alternative claim framed under s. 2, sub-s. 3, of the Copyright Act, 1911, for permitting the said hall to be used for the said performance. A variety of defences are set up. The first is, that the plaintiffs are a trade union within the meaning of the Trade Union Acts, 1871 to 1913; and that consequently their registration and

(1) (1838) 9 Sim. 151.
(2) 13 App. Cas. 523.
(3) [1905] A. C. 454.
(4) (1841) 11 Sim. 572.
(5) [1920] 1 Ch. 201.

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incorporation as a limited company is void under s. 5, sub-s. 3, of the Trade Union Act, 1871.

The plaintiffs contend that I am debarred from considering this defence in these proceedings, because they produce their certificate of incorporation, which they say is conclusive evidence under s. 17, sub-s. 1, of the Companies (Consolidation) Act, 1908. This contention is in my opinion unsound. The very point was decided, and in my opinion rightly, by Hamilton J., now Lord Sumner, in *British Association of Glass Bottle Manufacturers* v. *Nettlefold.* (1) It is argued that s. 1, sub-s. 1, of the Companies (Converted Societies) Act, 1910, which was not before the Court in that case, shows that the intention of the Legislature was to make the certificate of incorporation conclusive in all cases; but I think that this argument omits to consider the special provision in s. 294 of the Companies Act, 1908, which seems to me to enact in terms that that Act is not to affect the provisions of the Trade Union Act, 1871.

I, therefore, decide this point against the plaintiffs, and proceed to the consideration of the allegation that they are a trade union within the meaning of s. 5, sub-s. 3, of the Act of 1871. The definition of the expression "trade union" in that Act was as follows: "The term 'trade union' means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." This definition was modified by the Act of 1876, s. 16, by making it immaterial whether the combination would or would not, but for the Act of 1871, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. A number of authorities were cited to me, decided while the statutory definition of "trade union" was as above stated,

(1) 27 Times L. R. 527.

in which various associations were held to come within the statutory definition of "trade union." Without dealing in detail with these cases, they may be said to show that the interpretation of the definition gives it a very wide operation; and that many associations which would not in ordinary language be spoken of as trades unions come within its scope. That indeed appears from the definition itself, which contains a proviso excluding an ordinary partnership, it being thought, I suppose, that even the mutual surrender by partners of their individual liberty to trade would otherwise bring a partnership within the definition. The cases cited, however, all contain, in a greater or less degree, the element of a surrender of freedom to trade in the form of an undertaking either not to employ persons dismissed by other members, or not to manufacture more than a certain quota of goods, or not to sell at less than certain prices. Since the latest of these cases was decided, the Trade Union Act, 1913, has enacted a new definition of the expression in s. 2, sub-s. 1, and s. 1, sub-s. 2: "The expression 'trade union' for the purpose of the Trade Union Acts, 1871 to 1906, and this Act, means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects." Then there is a proviso which is immaterial to the present case. Then the expression "statutory objects" is defined in sub-s. 2 of s. 1 thus: "For the purposes of this Act, the expression 'statutory objects' means the objects mentioned in s. 16 of the Trade Union Act Amendment Act, 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members."

Two changes are made by this new definition. In the first place, to fall within the definition the combination must have statutory objects as its principal objects; and, in the second, a new statutory object—namely, the provision of benefits to its members, is added. Mr. Barrington-Ward took the point without arguing it that under this, the latest

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definition, a combination cannot be a trade union unless in addition to one of the other statutory objects it has for one of its principal objects the provision of benefits to members. It is unnecessary, in the view which I take of the case, to decide this point, and I express no opinion on it. Otherwise, the effect of the new definition is, that it is not enough that one of the objects of the combination is to impose a restriction upon a trade or business if that object is merely subsidiary. The new definition has thus narrowed the meaning of the term "trade union" and may well have affected the authority of some of the cases cited to me. The essential factor in the definition for the purposes of the present case is that one of the objects of the combination must be to impose restrictive conditions on the conduct of a trade or business. I must see, therefore, whether that factor exists in the present case.

The plaintiff company is a company limited by guarantee; and the objects as set forth in the memorandum of association, are as follows, so far as material. Para. 3 of the memorandum of association says: "The objects for which the company is established are: (*a*) To exercise and enforce on behalf of members of the company, being the composers of any musical works or the authors of any literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works (hereinafter called 'the proprietors') all rights and remedies of the proprietors by virtue of the Copyright Act, 1911, or otherwise in respect of the public performance of their works." That is amplified by subsequent paragraphs in the memorandum. I need not read them over again; they were all read during the argument of the case. Then the articles of association provide the machinery by which these objects are to be achieved. That machinery may, I think, be summed up as follows. Members are limited to composers, authors, publishers, or proprietors of musical, literary or dramatic works. Members who are publishers must, and the others may, assign to the company their interest, present and future, in the right to

perform any musical or dramatic work published by them. The company then has the sole right during the period of membership to authorize or forbid the public performance of all or any of the works of the publisher, to grant licences and collect fees and the like in respect of such public performance. The moneys so obtained are used in the first instance to pay expenses, and the balance is distributed among members in proportion to the number and popularity of their works. The way in which the Society works was stated in admissions which were put in by the defendants. So far as I need refer to them, they show that the present membership consists of 469 persons, firms or companies; the Society is affiliated to similar societies in France and Italy, and acts as their agents to grant licences for the performance in the United Kingdom of the works of the members of the French and Italian societies; the Society owns or controls the performing rights in over a million musical works, the performing rights in the works of the members of the Society and of the societies affiliated to it are vested in the respective societies, and the rights of the Society and affiliated societies are those of any other owners of similar rights; the Society grants licences to perform all or any of the works owned or controlled by it to the proprietors of theatres, music halls, cinematograph theatres, concert halls and the like, as and when such proprietors please; the number of such licences exceeds 4000.

It was urged upon me that members thus agreeing were submitting to restrictive conditions on the conduct of their trade or business. I do not take that view. Copyright and the various components which go to make it up are a species of property, and I cannot see that the company by taking an assignment of a person's property or a portion of it is imposing restrictive conditions upon that person's trade or business. Even if it can be said to be part of the trade or business of a composer or publisher to authorize or license the public performance of his works, I fail to see how the assignment of the right to do so in any particular case, or in the case of all the works the copyright of which he owns or may own, is a

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restrictive condition upon it. The sale of the property carries with it the right to use it, and the loss of that right is not a restrictive condition upon the seller's business, for upon its sale the property goes altogether out of his business which in future is carried on without it. I am of opinion, therefore, that the plaintiff company is not a trade union within the definition and this defence fails. I am fortified in this opinion by the decision of Lord Hunter given recently in the Court of Session in the case of *Performing Right Society, Ld.* v. *Lord Provost, Magistrates and Councillors of the City of Edinburgh.* (1) That learned judge came to the conclusion, as I have done, that this company was not a trade union, and I am glad to find that my opinion on the point coincides with his.

It is next contended that the plaintiff company cannot maintain this action for lack of the right to sue in respect of the copyright in the two songs. The plaintiffs' title to the performing rights of the song called " A Devonshire Wedding " is derived as follows: By indenture dated June 26, 1916, Chappell & Co., Ld., assigned to the plaintiffs, " First, all that the right of performance in all parts of the world of each and every song with the words thereof or musical work not being a musical play the right of performance of which now belongs to or shall hereafter be acquired by or be or become vested in the assignor during the continuance of the assignor's membership of the Society." The consideration was a covenant by the plaintiffs " that the Society will from time to time collect and pay to the assignor in respect of the said performing rights such sums of money out of the moneys collected by the Society in respect of the public performance of the works of its members as shall represent the share of the assignor therein in accordance with the rules of the Society for the time being in force." Then there follows a covenant for further assurance. On January 3, 1919, the composer of the song assigned the copyright therein together with the sole right of representation to Chappell's. It is admitted that the indenture of June 26, 1916, does not effect a transfer

(1) Not reported.

of the legal title to the performing rights from Chappell's to the plaintiffs, but it is contended by the plaintiffs that it has effected an equitable assignment. The defendants contend that, while the indenture of June 26, 1916, may operate to create in the plaintiffs a title in equity enforceable inter partes it creates no right in rem enabling them to sue in their own name. In my opinion, the plaintiffs' contention is correct and the effect of the indenture of June 26, 1916, was to vest in them the equitable title to that part of the copyright which consists in performing rights as soon as the copyright came into existence. This seems to follow from the judgment of Peterson J. in *Erskine Macdonald, Ld.* v. *Eyles.* (1) It was argued that certain passages in the opinion of Lord FitzGerald in *Tailby* v. *Official Receiver* (2), showed that an assignment of future property had no greater operation than an agreement to assign, but the decision of the House in that case indicates the contrary, for, if the assignment of the future book debts in that case had no greater operation than an agreement to assign them, they must have passed in the bankruptcy to the Official Receiver and left the plaintiff with nothing but a claim against the bankrupt for damages for breach of agreement. The song entitled "Love in Lilac Time" was by a different author and the right was assigned to the plaintiffs by Keith Prowse & Co. and not by Chappell's, but for the purposes of the present point the facts relating to it were substantially the same. I hold, therefore, that the plaintiffs were assignees of that part of the copyright in the two songs which consists of the performing rights.

The question then arises whether being equitable assignees and not legal assignees they can maintain this action in their own name without joining their assignors. Now s. 6, sub-s. 1, of the Copyright Act, 1911, provides that where copyright has been infringed the owner shall be entitled to sue, and s. 5, sub-s. 3, provides that "where" (as in the present case), "under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, . . . shall be treated

(1) [1921] 1 Ch. 631. (2) 13 App. Cas. 523.

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for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly." No reason has been suggested to me for confining the meaning of "assignment" and "assignee" in this sub-section to assignments and assignees at law as distinguished from assignments and assignees in equity, but on the contrary to give the fuller meaning to the words is to maintain the position with regard to the assignment of copyright in future works as it stood before the Act of 1911, according to the decision in *Ward, Lock & Co.* v. *Long.* (1) It is true that the definition of "assignees" upon which that case turned has not been reproduced in the Act of 1911, but that may well be for the very reason that the provisions of the present Act were thought to cover the ground without it. I hold, therefore, that the plaintiffs are entitled to maintain this action in their own name.

This brings me to the question whether there was any infringement by the defendants of the copyright in either song. Infringement, so far as material to this case, consists under s. 2, sub-s. 1, of the Act of 1911, in doing, without the consent of the owner, anything the sole right to do which is by the Act conferred upon the owner, and under s. 2, sub-s. 3, in permitting for one's private profit a place of entertainment to be used for the performance in public of the work without the consent of the owner unless in the absence of knowledge and with no reasonable ground for suspecting that the performance would be an infringement. The sole right of performing or authorizing the performance of the work is given to the owner, and the defendants are alleged both to have performed and to have authorized the performance of both songs. What in fact took place was this. On November 1 the two songs in question were performed at Collins's Music Hall by Miss Southgate and Mr. Victor Gould respectively, the accompaniment being played in each case by the defendants' orchestra, and this, unless the performance was given with the authority or consent of the plaintiffs, was an infringement of their copyright in the performing rights.

(1) [1906] 2 Ch. 550.

It is not suggested that any express authority or consent was given by the plaintiffs to the defendants. On the contrary, it is clear from the correspondence that the plaintiffs were insisting on getting payment for a licence before they would give any such authority or consent to the defendants, and the defendants refused to make any such payment. The defendants' case is that Miss Southgate and Mr. Gould had such authority, and, of course, if they had that would suffice to prevent their performance constituting an infringement, and the authority given to them to perform the songs at a music hall would in my opinion be sufficient to cover the performance of the accompaniment by the orchestra. I am unable, however, to see any evidence of such an authority or consent having been given by the plaintiffs. Miss Southgate's evidence established that she obtained from Mr. Van Lier, a director of Messrs. Chappell & Co., his permission to perform the song "Love in Lilac Time" though not specially at this music hall. But Mr. Van Lier did not and could not act for the plaintiffs in giving such permission as he did give. The evidence as to what passed between Mr. Gould and Keith Prowse & Co. was not so clear, but at the utmost it amounted to no more than an expression by Keith Prowse & Co. of their desire that Mr. Gould should sing "A Devonshire Wedding" in public and to an orchestral accompaniment. Evidence was given that both Keith Prowse & Co. and Chappell & Co. advertised the fact that it was intended that the songs in question should be performed at Collins's Music Hall, but even if it had been proved, which it was not, that these advertisements came to the notice of the plaintiffs I do not consider that consent can be implied from the fact that they did not forbid the performance of the songs, particularly in view of the circumstance that the plaintiffs were evidently from the correspondence expecting that a licence would be taken out by the defendants until within a day or two of November 1.

This view of the case renders it unnecessary to consider the further point made—namely, that under s. 2, sub-s. 3, of the Copyright Act, 1911. But as the point was made and

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evidence called with regard to it I ought perhaps to state my view on it. The evidence established that the defendants were aware that both the songs in question were among those which Miss Southgate and Mr. Gould proposed to perform during their engagement at Collins's Music Hall, though they were not aware until the morning of November 1 that it was intended to perform them on that day. No one was called on behalf of the defendants to prove they were not aware that the performance would be an infringement of copyright. But it was suggested that they had no reasonable ground for suspecting that the performance would be an infringement, firstly because their agreement with Miss Southgate and Mr. Gould contained a covenant by those artists not to infringe any copyright by their performance, and secondly because of the advertisements issued by Keith Prowse and by Chappell. In my opinion, the defendants failed to establish the soundness of this contention. It was admitted that they knew all about the plaintiffs and their methods of business. It was proved that the plaintiffs' practice was to use their copyright not by licensing individual performers but by licensing the halls at which such performances were usually given. This being so, they must have suspected that the performers of songs, the performing rights of which were vested in the plaintiffs, might well rely on the hall being licensed and take no further steps to see that their performance was not an infringement of copyright.

In the result, therefore, I am of opinion that the defendants did infringe the plaintiffs' copyright, and the plaintiffs are entitled to an injunction restraining the defendants from committing further infringements of the copyright in these songs. As to damages, these are, of course, little more than nominal and I award 20*s.* in respect of them; and the plaintiffs must have their costs of this action.

Judgment accordingly.

Solicitors for plaintiffs: *Syrett & Sons.*

Solicitors for defendants: *Kenneth Brown, Baker, Baker & Co.*

G. H. K.

SALES *v.* LAKE AND OTHERS.

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Jan. 20;
Feb. 13.

Local Government — Stage Carriage — Charabanc — Charabanc Excursions — "Plies for hire" — Metropolitan Public Carriage Act, 1869 (32 & 33 *Vict.* c. 115), *s.* 7—*Statutory Rules and Orders* (1917—*No.* 426), *dated May* 1, *para.* 17 (2.).

The respondents advertised charabanc excursions to Brighton. Passengers purchased tickets before the time of departure at the offices of the respondents' agents, and arranged at the same time where they were to be picked up. After the number of passengers was ascertained the respondents hired a charabanc, the driver of which proceeded to pick up the passengers holding tickets at the places, being public streets, previously arranged as above. He was not authorized to and did not pick up any other persons en route:—

Held, that the charabanc was not plying for hire within the meaning of para. 17 (2.) of the Order (Statutory Rules and Orders (1917—No. 426)), dated May 1, applying the provisions of s. 7 of the Metropolitan Public Carriage Act, 1869, which enacts that if an unlicensed stage carriage "plies for hire" there shall be a penalty.

CASE stated by a Metropolitan Police Magistrate.

On July 28, 1921, the respondents, H. J. Lake, H. Caney, and Charabancs (London), Ld. (called herein "the company"), were charged on an information laid by the appellant Sales at the Westminster Police Court that Lake, on June 12, 1921, was the driver of an unlicensed carriage which unlawfully plied for hire in Grosvenor Gardens within the metropolitan police district, that Caney was the owner of an unlicensed carriage which unlawfully so plied for hire, and that Charabancs (London), Ld., on June 12, 1921, did unlawfully aid and abet the said Lake in the commission of the offence so charged.

By s. 4 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115): "In this Act 'stage carriage' shall mean any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of this Act, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein. 'Hackney carriage' shall mean any carriage

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for the conveyance of passengers which plies for hire within the limits of this Act, and is not a stage carriage." By s. 7: "If any unlicensed hackney or stage carriage plies for hire" there shall be a penalty. And further: "Any . . . . stage carriage plying for hire . . . . shall be deemed to be an unlicensed carriage." And an Order made by the Home Secretary under the powers conferred on him by s. 3 of the London Cab and Stage Carriage Act, 1907 (7 Edw. 7, c. 55), dated May 1, 1917, Statutory Rules and Orders (1917—No. 426), provided by para. 17: "In pursuance of s. 3 of the London Cab and Stage Carriage Act, 1907, I hereby order that all Acts and Orders relating to stage carriages in London shall apply to . . . . (2.) Every carriage constructed in the form of an omnibus, char-a-banc, wagonette, cab, or other vehicle which is intended or used for the conveyance of passengers and which plies for hire in any street, road or place, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein, and which on every journey goes to or comes from some town or place beyond London."

The following facts, taken from the judgment of Lord Trevethin C.J., were admitted or proved: "On June 12, 1921, a charabanc with hackney carriage plates and yearly road licence affixed was driven by the respondent Lake to Grosvenor Gardens, in the metropolitan police district, where it stopped, and several persons were seen to approach the said Lake with tickets which he inspected. He then allowed the bearers of the tickets to board the charabanc. This was in accordance with the practice described below. The respondent Caney was the owner of the said charabanc, which had not been licensed under the Metropolitan Public Carriage Act, 1869, to ply for hire within the metropolitan police district. The said charabanc had been hired on June 11, 1921, from the respondent Caney by the respondents Charabancs (London), Ld., for the purpose of conveying passengers on June 12, 1921, from London to Brighton. The business of the company is to organize tours from London

to various parts of the country, and for this purpose agents are appointed in various parts of London and the provinces for the purpose of supplying information and issuing tickets to intending passengers, and advertisements are issued advertising the trips. The seats are booked by the passengers and the tickets are paid for before the journey, and when the tickets have been issued and the number of passengers for the particular journey ascertained it is the practice of the company to hire a charabanc from the said Caney to carry the passengers, and this practice was followed in this case. Numerous advertisements are exhibited by the company containing an illustration of a charabanc and announcing day and half-day tours to the seaside and countryside, starting from Charing Cross, and picking up passengers en route at Grosvenor Gardens, Vauxhall Bridge Road, and other places every day in each week from March 7 to September 30, 1921. A trip to Brighton and back to London is advertised as leaving Charing Cross daily at 9 A.M. Intending passengers are asked at the time of booking tickets where they wish to be picked up, and the driver is instructed accordingly where he is to meet them. A sheet is made out and given to the driver (there is no person other than the driver in charge of the vehicle) showing the number of seats booked and tickets issued. The driver is not authorized to pick up any passenger other than those who present tickets to him. On June 12, 1921, the practice above described was strictly followed by all the respondents, and the driver picked up only the passengers booked as aforesaid, and no other passengers." It was contended for the appellant that the said charabanc was a stage carriage plying for hire in Grosvenor Gardens, and, alternatively, that it was a hackney carriage plying for hire within the metropolitan police district.

The magistrate was of opinion that there was no plying for hire within the meaning of s. 7 of the Metropolitan Public Carriage Act, 1869, because no member of the public could have obtained a seat at Grosvenor Gardens who had not previously booked his ticket elsewhere, and dismissed the information; but stated this case.

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Artemus Jones K.C. and *Roome* for the appellant. The magistrate was wrong in dismissing the information, and took too narrow a view of the meaning of the words "plies for hire" in s. 7 of the Act of 1869. To ply for hire is to hold out a carriage to the public as ready for their use, and is not confined to plying up and down the street: see *Bateson* v. *Oddy*. (1) The mere pre-payment of the fare makes no difference; and a vehicle would still be plying for hire even if the owner advertised that it would not pick up passengers en route. Otherwise an omnibus which was full before starting and therefore unable to pick up passengers would be held not to be plying for hire. In the present case the plying, or solicitation, was by advertisement. *Foinett* v. *Clark* (2) shows that immediate solicitation is not necessary—indeed in that case there was no solicitation at all. The real test is whether there is a holding out of the vehicle to the public to be hired by the public. Applying that test here the charabanc was held out by advertisement to the public for hire by them, and was therefore plying for hire.

[*Birmingham and Midland Motor Omnibus Co.* v. *Thompson* (3) and *Allen* v. *Tunbridge* (4) were also referred to.]

Bernard Campion for the respondents. The magistrate was right. What the company did, as might any private person, was to go about trying to get together a party to make the trip to Brighton, and when they had collected the party, and all the contracts were complete, they hired the charabanc in question. Of course they might have hired a charabanc of any one else than the respondent Caney. Prior to the contracts no carriage was designated at all. In *Foinett* v. *Clark* (2), where the driver of the carriage had to refer a proposed passenger to an office to get an order before he could take him, but, notwithstanding this, was held to be plying for hire, the carriage was close at hand, on the spot, and designated before the contract.

Artemus Jones K.C. replied.

(1) (1874) 43 L. J. (M. C.) 131.
(2) (1877) 41 J. P. 359.
(3) [1918] 2 K. B. 105.
(4) (1871) L. R. 6 C. P. 481.

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The following judgments were read :—

LORD TREVETHIN C.J. This is a case stated by the stipendiary magistrate for the Westminster district. The material portion of the case is as follows : [His Lordship stated the facts as set forth above.] In my judgment the second alternative submission attributed to the appellants in the case—namely, that the charabanc was a hackney carriage within the meaning of s. 4 of the Metropolitan Public Carriage Act, 1869—may be disposed of briefly. For it is clear from the advertisement which forms part of the case, and is indeed impliedly stated in the case itself, that the passengers by this charabanc were charged separate or at the rate of separate fares. By s. 4 of the Act of 1869, a stage carriage is distinguished from a hackney carriage by the fact that the passengers are thus separately charged. But it is common ground that if this charabanc is a stage carriage, it can only come within the provisions of the Act of 1869, by virtue of para. 17 (2.) of the Order of the Secretary of State of May 1, 1917. The question therefore which we have to determine is whether para. 17 (2.) is applicable to this charabanc. That is in these words : "Every carriage constructed in the form of an omnibus, charabanc, wagonette, cab, or other vehicle which is intended or used for the conveyance of passengers and which plies for hire in any street, road or place, and in which the passengers or any of them are charged to pay separate and distinct or at the rate of separate and distinct fares for their respective places or seats therein, and which on every journey goes to or comes from some town or place beyond London." Then there is a proviso that it is not to apply to a four-horse coach.

The charabanc therefore would not be within para. 17 (2.) of the Order unless it "plies for hire in any street, road or place." In my judgment a carriage cannot accurately be said to ply for hire unless two conditions are satisfied. (1.) There must be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2.) the owner or person in control

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who is engaged in or authorizes the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers. If I may so express myself he must have appropriated, or be able at the time to appropriate, a carriage to the soliciting or waiting. Unless there is a carriage so appropriated or capable of appropriation it is in my opinion a misuse of words to say that it is plying for hire; the proper phrase would be that a man is soliciting or waiting for persons to make a contract with him which he proposes to fulfil by providing the necessary carriage. No doubt in popular language a cab is sometimes said to ply for hire when the process of soliciting or waiting is over, and the passenger obtained by this process is being driven on his journey. In my opinion that is an inaccurate expression, natural enough, since, before the journey began, the carriage was plying for hire, and as soon as the journey is over it will in the normal course be plying for hire again. But it is to be observed that even in this loose application of the phrase the idea of soliciting passengers is present; the phrase would not be used unless the speaker thought that the passenger had been obtained in this way, and that the process of soliciting or waiting for passengers would in due course be renewed as soon as the journey was over. Now the information in the present case charged that the driver was plying for hire while he was in Grosvenor Gardens. The learned magistrate has however found that when the carriage was in Grosvenor Gardens no member of the public could have obtained a seat in the vehicle for that journey who had not previously booked his ticket elsewhere. That is to say the process of soliciting was then over and the driver was merely receiving passengers who had already booked their seats. On this ground alone in my judgment the magistrate was right in refusing to convict. If there had been any empty seats for which the driver was prepared to take in casual passengers, I think he would have been plying for hire, but the magistrate's finding negatives this suggestion. But further, in my judgment on the findings of the learned magistrate there is no evidence that this charabanc was ever plying for hire, for upon the facts as found by

him at the time when the advertisements and tickets were issued, which was the only time when Charabancs (London), Ld., were soliciting passengers, no carriage was appropriated to the proposed journey. It was only after they had ascertained the number of passengers that the company ordered this charabanc. I observe that in their advertisement Charabancs (London), Ld., reserved the right to cancel the journey when less than fifteen persons had booked seats prior to the advertised starting time. This is strong evidence that at the time they began to solicit passengers they had not even made up their minds that they would ever procure this carriage, and in any event they certainly had no carriage in their possession until after the stage of soliciting or waiting for passengers was over. The distinction I seek to make is, I think, suggested in the case of *Cavill* v. *Amos*. (1) In that case the defendant owned a licensed cab, and also an unlicensed wagonette. He was at the station with his cab and solicited passengers for it, but the wagonette was in his coachhouse. A party of nine passengers came out of the station; the defendant invited them to take his cab, but as they all wanted to be in the same conveyance and the cab would not hold them all, they refused to take it. They added however that if the defendant had a carriage which would take them all they would hire it. Thereupon the defendant took them to his stables and they hired his wagonette. On these facts it was held that the defendant could not be convicted, and Channell J. observed (2): "It is, however, possible that a man might ply for hire with a carriage without exhibiting it, by going round touting for customers. That is, however, not this case. The appellant was touting for customers for his licensed carriage. He did not solicit persons to go in the wagonette."

I agree with those remarks and in my judgment they show that *Cavill* v. *Amos* (1) was a stronger case. For in that case the defendant owned the wagonette at the time he was soliciting passengers, yet because the soliciting was not connected with, or to repeat the expression I used before

(1) (1900) 64 J. P. 309. (2) Ibid. 310.

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"appropriated to" the wagonette, it was held that the defendant was not plying for hire with the wagonette. In the present case not only was the soliciting not appropriated to the charabanc but the respondents, Charabancs (London), Ld., were not in possession of and had not, on the evidence, any right to the possession of this or any charabanc at the time they solicited passengers. And indeed in view of their reservation of the right to cancel the trip, if they did not obtain fifteen passengers, it is fair to say that they had no definite intention to procure this charabanc when they began soliciting.

It follows in my opinion that the charabanc was not plying for hire in Grosvenor Gardens within the meaning of para. 17 (2.) of the Order of May 1, 1917. Consequently the Act of 1869 does not apply and the charge fails in limine. And it follows also from the view I take, that the charabanc was not plying for hire within s. 7 of the Act of 1869.

In my judgment therefore the learned magistrate was right in refusing to convict.

AVORY J. The information in this case was laid under s. 7 of the Metropolitan Public Carriages Act, 1869, which makes the owner and driver of an unlicensed stage carriage that plies for hire within the limits of the Act liable to a penalty, and provides that any stage carriage plying for hire shall be deemed to be an unlicensed carriage. Prior to the coming into operation of the London Cab and Stage Carriage Act, 1907, stage carriages which on every journey go to or come from some town or place beyond the limits of the metropolitan police district were exempt from the provisions of the statutes regulating hackney and stage carriages in the metropolis, but under s. 3 of the Act of 1907, the Secretary of State has made an order that all Acts and Orders relating to stage carriages in London shall apply to every charabanc or other vehicle which is intended or used for the conveyance of passengers and which plies for hire in any street, road or place, and in which the passengers are charged separate and distinct fares, and which on every journey goes to or comes from some town

or place beyond London. By s. 6 of the Act of 1907, the expression "stage carriage" is to have the same meaning as in the Metropolitan Public Carriage Act, 1869, as amended by the Act of 1907, and by s. 4 of the Act of 1869, "stage carriage" is defined to mean any carriage for the conveyance of passengers which plies for hire in any public street, road, or place within the limits of the Act and in which the passengers are charged separate fares. The charabanc in question which was being driven by the respondent Lake on June 12, 1921, had affixed to it a hackney carriage plate indicating that a licence had been taken out for it as a hackney carriage under the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 13. By para. 3 of Sch. 2 to that Act, hackney carriages are defined as in s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), and in that Act of 1888, a hackney carriage means any carriage standing or plying for hire, and includes any carriage let for hire by any person whose trade or business it is to let carriages for hire, but although for revenue purposes this was a hackney carriage, the Metropolitan Public Carriage Act, 1869, defines a hackney carriage as a carriage for the conveyance of passengers which plies for hire and is not a stage carriage. But the charabanc in question was undoubtedly a stage carriage, and the question for decision, therefore, appears to be whether upon the facts stated in the special case, it can be said to have been plying for hire in any public street, road or place within the metropolitan police district. The omission of the word "public" before "street, road or place" in para. 17 (2.) of the Order dated May 1, 1917, made by the Secretary of State under the Act of 1907, may give rise to a question whether the Order is not ultra vires; but whether it is so or not, I have come to the conclusion that it was necessary, under the circumstances in this case, to prove that the carriage was plying for hire in a public street, road or place, and not merely within the metropolitan police district, otherwise it would not be a stage carriage within the meaning of the Act of 1869. The cases of *Bateson* v. *Oddy* (1) and *Allen* v. *Tunbridge* (2) are perhaps

(1) 43 L. J. (M. C.) 131. (2) L. R. 6 C. P. 481.

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the most favourable authorities in support of the appellant's contention. In neither of these cases, however, was it necessary to prove that the carriage was plying for hire in a public street, road or place, and as Montague Smith J. said in the latter case (1) "plying for hire" is very different from a customer going to a job-master to hire a carriage, and I think Mr. Meadows White was right in his argument in that case when he said (2) "plying for hire" means soliciting custom without any previous contract. I do not think the decision in the *Birmingham Case* (3), which turned on the meaning of the word "omnibus" in the Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), assists the appellant's contention.

In the result, I cannot say the magistrate was wrong in holding that there was no plying for hire by a stage carriage within the meaning of s. 7 of the Act of 1869, although the case seems to be within the mischief contemplated by that Act as amended by the Act of 1907. Therefore I agree that the appeal should be dismissed.

McCardie J. desires me to say that he has read the judgment which I have just delivered, and that he agrees with it.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondents: *Engall & Crane.*

(1) L. R. 6 C. P. 485. (2) Ibid. 481, 484.
(3) [1918] 2 K. B. 105.

W. L. L. B.

[IN THE COURT OF APPEAL.]

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Dec. 6.

GRAHAM JOINT STOCK SHIPPING COMPANY, LIMITED *v.* MOTOR UNION INSURANCE COMPANY, LIMITED.

[1921. G. 1239.]

Insurance (Marine)—Loss of Ship—Action by Mortgagee—Practice—Discovery—Affidavit of Ship's Papers—Affidavit by Owner.

The plaintiff in an action on a policy of marine insurance must himself make, and use all practicable means to procure other persons interested to make, an affidavit of ship's papers. In his affidavit the plaintiff must disclose not only every material document in his possession, but also every material document in the possession of the other persons interested; or else he must show what efforts he has made to obtain those documents and why he has been unable to obtain them; and he must account on oath for the disappearance of material documents which have been but are no longer in the possession of himself or other persons interested. The action will be stayed until this is done.

Mortgagees of a ship brought an action on a policy insuring the ship against war risks. The ship was insured by this and other policies against war risks to an amount largely exceeding the amount of the mortgage. The defence was that the ship had been intentionally lost by her master and crew with the connivance of her owner.

The Court stayed the action until the plaintiffs should make a proper affidavit of ship's papers and procure, or satisfy the Court that they had used all practicable means of procuring, an affidavit from persons interested and particularly from the owner.

Fraser & Co. v. *Burrows* (1877) 2 Q. B. D. 624 overruled.

APPEAL from an order of Greer J. in chambers dated November 24, 1921, dismissing an application by the defendants :—

(1.) That the plaintiffs should file a further and better affidavit of ship's papers;

(2.) That an affidavit of ship's papers should be filed by one Elie Angelis and by J. & C. Harrison (London), Ld., and any other persons, firms, or corporations having an interest in the proceedings;

(3.) That pending compliance with paras. (1.) and (2.) the action should be stayed.

The action was brought to recover for the total loss of the

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steamship *Ioanna* upon a policy of insurance against war risks effected with the defendants on November 30, 1920. The plaintiffs were mortgagees of the ship. They claimed under two mortgages. The first was dated July 28, 1920, and made between Elie Angelis, of Athens, the owner of the ship, and the plaintiffs, and it declared that the plaintiffs had lent on May 21, 1920, to Angelis the sum of 145,000*l.* upon the security of a first mortgage on the whole of the shares in the ship. The loan was effected by bills drawn by Angelis on the plaintiffs at three months to be discounted in London by the plaintiffs, and Angelis agreed to pay the cost of bills, stamps, and expenses of preparing and enforcing the mortgage and a commission on the bills. The loan was to be repaid in instalments extending over five years, as provided by the mortgage. It was agreed that J. A. Mango, shipowner, of London, was appointed by Angelis to act as his attorney during the currency of the mortgage with full power to do on behalf of Angelis anything in relation to the mortgage that Angelis himself could or ought to do thereunder. The vessel was to be insured at the expense of the owner against all risks, especially risks resulting from the war, and the policies of insurance were to be indorsed to the plaintiffs, who were empowered to enforce the mortgage to the fullest extent in the British Courts. The costs and discount charges and commission on bills mentioned above amounting in all to 12,000*l.* were the subject of the other mortgage, which was dated September 1, 1920.

The writ was issued on April 19, 1921. On April 28, 1921, an order was made that the action should be transferred to the commercial list and "that an affidavit as to ship's papers be given by the plaintiffs and parties interested. Stay unless given in 21 days."

On June 22, 1921, an affidavit of ship's papers was filed by Mr. Graham, the chairman of the board of directors of the plaintiff company, who deposed in para. 2 of his affidavit that the plaintiff company was only partly interested in the proceedings or in the insurance the subject thereof. In para. 3 he stated: "To the best of my knowledge information and

belief the plaintiff company has not now and never had in its possession custody or power or in the possession custody or power of its brokers solicitors or agents " any of the documents specified in Form 19 in Appendix K to the Rules of the Supreme Court " save and except the documents mentioned in the schedule hereto. . . . ."

The schedule contained a list of nineteen policies of insurance amounting in all to 399,500*l.* against war risks, including the policy sued upon; originals or copies of seventeen documents, and copies of fourteen letters.

On July 6, 1921, an order was made in chambers on the plaintiffs' application fixing December 8, 1921, as the date of the trial of the action.

On receiving the affidavit of June 22, 1921, the defendants' solicitors wrote to the plaintiffs' solicitors on July 25, 1921, to say that it was insufficient, and they specified the following omissions among others :—

(1.) Marine risk policies.

(2.) Slips for marine and war risk policies.

(4.) Debit notes for premiums and receipts therefor.

(5.) Builders' specifications and plans for hull and machinery of the vessel.

(8.) Marconi operator's log.

(9.) Copies of all Marconi messages sent to the vessel on the voyage from Newport News on which she was lost.

(13.) Correspondence between Messrs. Simpson, Spence & Young (the agents for the owners of the *Ioanna* in New York) and Mr. Papadakis the captain.

(14.) Correspondence between Mr. Mango and Mr. Angelis.

(15.) Correspondence between the captain and Mango or Angelis after the loss.

(16.) Correspondence between Angelis or Mango and the plaintiffs relating to the mortgage, payment of interest thereon, chartering and loss of the steamer.

(17.) The ship's register and crew list.

On July 29, 1921, the plaintiffs' solicitors wrote: " We will deal seriatim with the various documents of which in your letter you demand production :—

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"(1.) We will obtain these documents.

"(2.) The slips have never been in the plaintiffs' possession. Presumably they are held by the brokers, but we will endeavour to obtain them. . . . ."

"(4.) These are quite irrelevant and their production obviously unnecessary.

"(5.) Is it seriously suggested that production of the builders' specification for hull and machinery will in any way assist your clients in their defence ? . . . ."

"(8.) The Marconi operator states that he saved nothing.

"(9.) We are ascertaining if any copies of Marconi messages exist. . . . ."

"(13.) and (14.) We are asking our clients to make further inquiries as to whether any such correspondence exists. It is obviously not in their possession.

"(15.) We are instructed that no further correspondence exists other than that already produced.

"(16.) We are again inquiring of our clients whether any such correspondence exists.

"(17.) We will endeavour to obtain this. . . . ."

The letter concluded: "When we have ascertained from our clients whether the further correspondence and documents to which you refer exist we will consider whether we can comply with your request for a further affidavit of ship's papers."

After further correspondence the defendants' solicitors wrote on October 4, 1921, that the order for ship's papers had not yet been properly complied with; that of the seventeen heads mentioned in their letter of July 25 the further documents produced since then appeared to dispose of Nos. 3, 10, 11 and 12 and partially of Nos. 4, 14, and 15, but that none of the other heads had been dealt with at all, nor had any explanation been given of the failure to produce these documents; and that in addition to these they noticed references to the following documents which should be produced:—

(A) a telegram from Angelis to Mango referred to in a letter from the former of January 24, 1921;

(B) telegram from Angelis to Captain Papadakis referred to in the same letter;

(C) earlier telegram of January 25, 1921, from Angelis to Mango referred to in later telegram of same date;

(D) "my previous letters" referred to by Angelis in a letter to Mango of June 28, 1921;

(E) two letters from Captain Papadakis to Angelis referred to in this same letter;

(F) Correspondence between the plaintiffs and Messrs. J. & C. Harrison (1920), Ld., with reference to the mortgage and charter of the vessel.

(H) The writ orders and pleadings in an action commenced for the plaintiffs by Messrs. Crump against Messrs. Barber and D'Ambrumenil and Mr. Angelis, and any correspondence which has passed between the plaintiffs and Messrs. Crump, and Messrs. Crump and the defendants or their solicitors in connection therewith. The letter concluded thus:—

"In view of the issues which are raised in this action we must insist that all documents produced should be produced upon oath, and we must therefore ask for a further and better affidavit covering both the documents produced since the first affidavit was filed and also the further documents referred to in this letter and in our letter of July 25 last."

On October 17, 1921, the plaintiffs' solicitors replied that the items (A), (B) and (C) were altogether irrelevant; that the letters included under (D) and (E) were written after action brought, and that there was nothing to show that these letters related to the loss; and that the documents under (F) and (H) were irrelevant and outside the scope of the order for ship's papers.

Further letters passed between the solicitors, as the result of which on October 28, 1921, on the defendants' application an order was made in chambers that the plaintiffs should file a further and better affidavit of ship's papers.

On November 12, 1921, the chairman of the board of directors of the plaintiff company made a further affidavit of ship's papers in which he deposed that on the date of

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making his affidavit of June 22 he had disclosed all the documents which were in possession of the plaintiff company as mortgagees, but upon written requests being made by the defendants' solicitors the plaintiff company had obtained further documents which were set out in the schedule, and that apart from the last mentioned documents and those set out in the former affidavit the plaintiff company to the best of his knowledge information and belief had not then and never had in its possession custody or power or in the possession custody or power of its brokers solicitors or agents any insurance slips, policies, letters of instruction, etc. (continuing in the terms of Form 19 in Appendix K to the Rules of the Supreme Court), save and except the documents set out in the schedule. The affidavit continued thus :—

"4. I have read the letter from the defendants' solicitors to the plaintiffs' solicitors dated July 25 and with regard to the various items mentioned therein and numbered (1) to (17) I say as follows :—

"(1.) The marine risk policies are set out in the schedule to this affidavit and have been produced.

"(2.) The slips for marine and war risks insurances have never been in the plaintiff company's possession and presumably they are in the hands of the brokers who acted on behalf of the owner in effecting the insurances. . . . ."

"(4.) Such of these as the plaintiff company have been able to obtain have been produced and they are set out in the schedule to this affidavit.

"(5.) Such plans of the S.S. *Ioanna* as the plaintiffs have been able to obtain have been produced, but the builders' specification for hull and machinery is not in the plaintiffs' possession, and, it is submitted, is not material." . . . .

"(8.) The Marconi operator states that he saved nothing and the plaintiff company is informed that there is no log of his in existence.

"(9.) So far as the plaintiff company is aware there are

no copies of Marconi messages sent to the vessel on her voyage from Newport on which she was lost in existence." . . . .

"(13 and 14.) This correspondence was not in the plaintiff company's possession at the time of making my former affidavit, but such of it as the plaintiff company has since been able to obtain has been produced to the defendant company's solicitors.

"(15.) There is no correspondence in the plaintiff company's possession other than that already produced and to the best of the plaintiff company's information knowledge and belief there is no other such correspondence in existence.

"(16.) So far as the plaintiff company is aware there is no correspondence in existence other than that which has been produced.

"(17.) The plaintiff company has been informed that the ship's register and crew list which were saved by the captain were lost by him during his journey back to Greece."

The affidavit then referred to the letter of the defendants' solicitors dated October 4, 1921, and to the documents (A) to (H) mentioned therein, and stated as to (A) (B) and (C) "The plaintiff company has been unable to obtain the telegrams referred to or copies thereof, but it is obvious from the letters in which they are referred to that they are irrelevant.

"(D) and (E). The letters referred to were written after the action was brought. They are not in the plaintiff company's possession and there is nothing to show that they relate to the loss of the *Ioanna*.

"(F) and (H). The correspondence and documents referred to are irrelevant. . . . ."

The first part of the schedule specified various policies of insurance against marine risks amounting in all to about 399,000*l.*, and about 150 documents including certificates, telegrams, letters and copies of letters and telegrams, and others.

The statement of claim in the action was delivered on

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November 17, 1921. It alleged that on February 19, 1921, the *Ioanna* struck a mine off the east coast of Spain and thereafter was totally lost. The defence, delivered on November 30, 1921, alleged that the loss was not caused by war perils but was caused by the wilful casting away of the steamer by her master or officers and crew or by the fraud of the owner, Elie Angelis, or his agents in procuring or conniving at the wilful casting away of the steamer.

On November 24, 1921, application was made to Greer J. in chambers for a further and better affidavit of ship's papers as aforesaid. The learned judge refused the application. On November 28 the Court of Appeal gave leave to the defendants to appeal from the order of Greer J. On the hearing of the appeal an affidavit by Douglas Thornbury Garrett, a member of the firm of solicitors representing the defendants, was read. It contained the following statements :—

" 2. The action is brought against the defendants upon a policy for 20,000*l.* issued by them upon the steamship *Ioanna* for six months from December 29, 1920, against war risks only. There are other similar policies issued by other marine insurance companies and Lloyd's underwriters for an amount of 300,000*l.* in all making a total insurance against war risks on the said vessel of 320,000*l.* The said companies and underwriters have at the plaintiffs' request signed an agreement in the usual form to be bound by the result of this action. There are also policies totalling 80,000*l.* on freight against war risks, but the underwriters on those policies have not signed the said agreement to be bound, and an independent action is pending in respect of them.

" 3. The said vessel was of Greek nationality and was at the time of her loss owned by Mr. Elie Angelis of Piræus, Greece. She is alleged to have been lost by striking a mine off the east coast of Spain on February 19, 1921.

" 4. The statements of the captain and crew of the vessel which have been produced by the plaintiffs in this action as well as other statements and evidence which have been obtained by the defendants from witnesses who saw the

vessel before she sank and others indicate strong grounds of suspicion as to the real cause of the vessel's loss and as to the bona fides of the allegation on the part of her captain that she was lost by reason of a mine. The loss is one of many losses of Greek merchant vessels which have taken place during the early part of the present year, amounting as I am informed and believe to a total insured value of between 8,000,000*l.* and 9,000,000*l.* by alleged marine and war risks, the frequency of which combined with the circumstances of each case has given rise to the gravest suspicions of their bona fides in the minds of British underwriters and companies with whom the said vessels have been insured. I have caused inquiries to be made at Lloyd's, as a result of which I am informed and believe that the losses of Greek merchant vessels by mines during the whole war, i.e., from August 4, 1914, to November 11, 1918, were three in number, while the losses by alleged mines of merchant vessels owned either nominally or actually by Greeks during the period from February to July of the present year, i.e., during the recent serious decrease in shipping values, number eight. . . . . The corresponding losses by mines of British merchant tonnage were during the war period 259 ships and during the period from February to July, 1921, no ships. . . . . The documents which have been produced to the defendants in this case show clearly that the owner of the vessel was in very serious financial embarrassment at and before the time of the loss. He is stated to have paid 330,000*l.* for the vessel at the time when shipping values were high; between May, 1920, when she was delivered to him, and February, 1921, when she started on the voyage on which she was lost, she had apparently obtained only one cargo, viz., from the United States to Rotterdam, at a freight which seems to have shown the owner no profit, freights having by that time fallen very seriously, for at the end of this voyage he was compelled to borrow some 5750*l.* from parties other than the plaintiffs to pay the vessel's disbursements at Rotterdam and enable her to leave that port. Her value at the time of the loss was, according to my information and belief, about 105,000*l.*,

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which is less than one-third of the sum . . . . for which she was at the time of the loss insured.

" 5. The plaintiffs in the present action sue as mortgagees of the ship under a mortgage to secure the account current, and, so far as I have been able to ascertain from the documents produced (in the absence of the account current between themselves and the owner, which has not been produced), the debt at present due to them on the mortgage from the owner is not more than 200,000*l.* as against total war risk insurances which depend upon the result of this action amounting to 320,000*l.*, so that it is obvious that the owner, Elie Angelis, although not a party to this action, is very substantially interested in the proceedings.

" 6. The writ in this action was issued on April 19, 1921."

The affidavit proceeded to relate the orders of April 26, July 6, the affidavit of June 22, the letters above mentioned, and the order of October 28, 1921, for a further and better affidavit of ship's papers, and proceeded :—

" No further affidavit was delivered to me under this order until November 17, 1921, and it was then ascertained that this affidavit disclosed solely documents which had already been produced to the defendants since the date of the first affidavit and contained no fresh documents whatsoever, though it did contain explanations put forward by the plaintiffs of their failure to produce many of the documents demanded. . . . . Most of these explanations are in the defendants' submission entirely inadequate and indicate that no proper effort has been made by the plaintiffs to procure and produce the documents specified. For instance none of the slips relating to any of the insurances effected upon the said vessel, her freight, disbursements or premiums have been produced. These slips are of great importance to the defendants' case and have been called for, and the only explanation given in the plaintiffs' affidavit of their non-production is, as appears in sub-paragraph (2) of clause 4 of the said affidavit, that the said slips ' are presumably in the hands of the brokers ' and are not in the hands of the plaintiffs. There is no evidence whatever that the plaintiffs have made any

effort to obtain them, and if they had made such efforts it seems unlikely that the brokers would have refused to produce them. Similar criticisms apply to many of the other sub-paragraphs of clause 4 of the said affidavit. In particular sub-paragraph (8) of paragraph 4 of the said affidavit, which deals with the wireless log of the said vessel, states that the said log was not saved. I believe this statement to be contrary to the fact. Upon the happening of the said loss my firm sent a representative, Mr. W. L. McNair, to Spain to interview and obtain statements from the crew of the said vessel. Mr. McNair obtained a statement from the Marconi operator of the said vessel in which it is distinctly stated that the Marconi log was saved, and moreover Mr. McNair upon his return informed me and I believe that he himself saw the said wireless log. The said log is a document to which the defendants attach very great importance as possibly throwing light upon the cause of the vessel's loss, and I submit that the production is essential.

"7. . . . . I submit that it is clear that there is in existence correspondence passing between Mr. Angelis, the owner who resided in Greece, and Mr. Mango his manager who resided in London, relating to the sailing of the vessel and to her loss. There is probably also correspondence between Mr. Angelis and Mr. Papadakis, the captain of the vessel, which has not been produced. None of the owner's books of account, nor the account current between him and the plaintiffs secured by the said mortgage nor any of the vessel's voyage accounts have been produced. There must be documents relating to the negotiating of the plaintiffs' mortgage and to the registration of the vessel and of the mortgage in Greece, none of which have been produced and which are most material. . . . .

"8. In view of the fact that as above stated Mr. Angelis at all events and possibly other parties are interested in the result of these proceedings and that an order has been made that affidavits of ship's papers shall be sworn by all parties so interested, I submit that the defendants are entitled to an order for an affidavit of ship's papers from the said Elie Angelis and such parties if any. . . . . There is no evidence that

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the said Elie Angelis has refused or would refuse to comply with the order of the Court or that any effort whatever has been made to get him to comply with the order already made on April 28, 1921, and I do not believe that any such effort has been made. . . . .

"10. I submit that having regard to the circumstances of this loss and to the fact that the plaintiffs are suing as mortgagees only, in which capacity many of the most important documents bearing upon the case would not be in their possession or power, it is essential to the proper investigation of this case by the Court and to the preparation of the underwriters' defence that an affidavit of ship's papers should be sworn by the said Elie Angelis and by all other parties interested in the subject matter of the action. . . . ."

Raeburn K.C. and *Beazley* for the appellants.
Hogg K.C. and *Jowitt* for the respondents.

BANKES L.J. This is an appeal from a decision of Greer J. which raises the question whether there ought to be a further and better affidavit of ship's papers in this case. The order was made on April 28 upon an order for directions: "That an affidavit as to ship's papers be given by the plaintiffs and parties interested. Stay unless given in 21 days." I am not sure whether any formal order was drawn up for ship's papers or not. After the discussion that we have heard in this case I cannot help thinking that either some form should be adopted in the Commercial Court for general use, or that the parties should draw up an order in each case. There is a formal order given in the Appendix to the Rules of the Supreme Court, Form No. 19 in Appendix K. There is a note appended to that form by the editors of the Annual Practice that the form of order omits certain words which were held in the *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.* (1) to be words that might be, or ought to be, included in the order, and it further appears that there is a Law Stationers' form of order in use which is apparently in proper

(1) (1881) 8 Q. B. D. 142.

form including the words which are omitted from the official order, and which fills up the blanks in the official order with proper language. The only observation that I have to make about the Law Stationers' form is that there may be cases in which, in addition to the order, "the plaintiffs and all persons interested in these proceedings and in the insurance, the subject matter of the action do produce" and so forth, the name of some party interested from whom an affidavit is required should be specifically inserted.

This action is brought by the mortgagees of a ship called the *Ioanna* owned by a Greek subject claiming against war risk underwriters an amount which they say is due to them upon their mortgage, the ship having been sunk through coming into collision with a mine. Among other defences the defence is raised that "the loss, if any, was caused by the wilful casting away of the steamer by her master or officers and crew." It is obvious, therefore, that a very serious issue is raised in the case in which a very large amount of money is involved. The order as I have said was made in that general form, and an affidavit was made by Mr. Graham on behalf of the plaintiffs. The first affidavit that he made was obviously insufficient. A second affidavit was asked for and an order was made for a further and better affidavit, and it is said that the second affidavit is also wholly insufficient. The matter came before Greer J. on an application for a further and better affidavit, and we are told by Mr. Hogg that certain offers were made by the plaintiffs of an affidavit which they were prepared to have sworn by the agent in this country of the Greek owner. Apparently the learned judge thought that having regard to the date fixed for the trial and the offers which were made by the plaintiffs in reference to this further affidavit, and probably also some explanations that may have been given by counsel for the plaintiffs, he ought not to make any order.

I do not agree with that view. I think this case is one in which the Court ought to say that the defendants are entitled to a strict observance of the practice with regard to ship's papers. It now appears at a very late stage that the Greek

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owner is very largely interested in the policies on this vessel, which the defendants allege was cast away. One of the things that the defendants were pressing for was the current account between the plaintiffs and the Greek owner. This was not disclosed either in the first or second affidavit of ship's papers; because, it is said, the materiality of it was not recognized. That means that sufficient attention was not paid to the real issues in the case; but whatever was the reason, the fact of the non-disclosure is in itself a ground for saying that in this case the defendants are entitled to have the practice strictly followed.

The plaintiffs' affidavits are defective in several particulars: first, there is no affidavit by the Greek owner, who it now appears is a person deeply interested, and no reason is given for its absence. Documents which have been in the possession of the owner or the plaintiffs, and which are not forthcoming, are not accounted for. The affidavits are insufficient on these points and on the other points which are referred to in Mr. Garrett's affidavit. We are told that in the Court below considerable reliance was placed upon the case of *Fraser & Co.* v. *Burrows* (1), and Mr. Hogg still relies upon it. That case was decided by a Court which consisted of Kelly C.B. and Field J. The facts there were that the plaintiffs were insurance brokers who had effected a policy on a cargo of oats on board the *Speedwell* on a voyage from Prince Edward's Island to the United Kingdom. The plaintiffs acted as agents for Hindman, who was the owner of the vessel and her cargo. The defendant underwrote a policy for 100*l.* After the policy was effected the cargo was sold to Hurrell, the real plaintiff in the action. Hindman was still in Prince Edward's Island and it would appear upon those facts that he had ceased to have any interest at all in the cargo. Cleasby B., who had great knowledge and experience in matters of marine insurance, made an order staying proceedings until the plaintiffs should produce an affidavit by Hindman of ship's papers and other documents in Hindman's possession. There was an appeal from that order. It is not necessary to say

(1) 2 Q. B. D. 624, 625.

whether or not the Court might, in its discretion, have allowed the appeal having regard to the fact that Hindman had ceased to have an interest in the cargo, and there is no evidence that the defendant was setting up that there had been any concealment on Hurrell's part; it is not necessary to consider that. But it is necessary to consider whether the decision of the Court was based on grounds consistent with the practice then established or subsequently recognized. Kelly C.B. said: "It does not appear that there has been any fraud on the part of either the nominal plaintiffs or the real plaintiff."—Of course that at once distinguishes that case from this.—"The order stays the action until they shall have done something which it is in effect impossible for them to do. This order could not have been maintained before the Judicature Acts, and s. 21 of the Supreme Court of Judicature Act, 1875, shows that it was intended to preserve existing procedure, so far as it was not inconsistent with the new procedure." Field J. came to the same conclusion. In my opinion the statement by Kelly C.B. that this order could not have been maintained before the Judicature Acts is not in accordance with the practice, and I do not think that this case ought to be regarded as an authority so far as the grounds upon which the order was made are concerned. I think that it is apparent from what is said in one or two other cases to which I will refer.

The next case is the case of the *West of England and South Wales District Bank* v. *Canton Insurance Co.* (1) That was decided in May of the same year and by a Court consisting of Kelly C.B., who had been a member of the Court in *Fraser & Co.* v. *Burrows* (2) in the preceding March, and Cleasby B., who had made the order then appealed against. The order in the later case was that all parties interested in addition to the parties to the action should make an affidavit. Kelly C.B. said: "I regret that the notice of motion prays for an order in this peculiar and unsatisfactory form—viz., that the action shall be stayed—not till the plaintiffs shall have satisfied the Court that they have resorted to all reasonable,

(1) (1877) 2 Ex. D. 472, 474. (2) 2 Q. B. D. 624.

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lawful, and practicable means in their power to produce, or cause to be produced, the ship's papers—but that the action shall be stayed till they have caused or procured affidavits to be made by a number of other persons over whom they may possess no control. I regret that the form is in those terms; but as it appears to be the form in which in actions of this kind orders have been made at chambers for a very long time, I think we shall be doing no injustice by making this order absolute." It seems to me that the Chief Baron directly went back from what he had said in *Fraser & Co.* v. *Burrows* (1) and recognized that he had been wrong in there saying that the order could not be maintained before the Judicature Acts. He went on to point out that "If the plaintiffs on another occasion apply to us showing that there is an absolute impossibility on their part in complying with the order, we may then consider what it is our duty to do." In a later case, which has also been referred to, of *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.* (2), Brett L.J., who also had great experience in these matters, said: "Long before the Judicature Acts, the peculiarity of insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. The reasons for this are not far to seek. The underwriters have no means of knowing how a loss was caused; it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters. The practice, therefore, arose of making the order on all parties interested, without an affidavit. Then after the Judicature Acts, the question arose whether this practice had been altered, and it was held in *West of England and South Wales District Bank* v. *Canton Insurance Co.* (3) for the reasons there given, that it

(1) 2 Q. B. D. 624. (2) 8 Q. B. D. 142, 145.
(3) 2 Ex. D. 472.

had not. As for the hardship on the plaintiffs, Cleasby B., who was beyond all others conversant with this head of the law, points out in the same case that a plaintiff must show that he has used every effort to discover, and that if he has bona fide done all he can, he will not be prejudiced." I think Brett L.J. there, although he does not say so in terms, is expressly disapproving of what Kelly C.B. said in *Fraser & Co.* v. *Burrows*. (1) The practice, therefore, being what it is, in my opinion this affidavit is wholly insufficient and an order must be made for a further and better affidavit, and in that order I think the provision should be inserted that one of the parties to make an affidavit shall be the Greek owner. It will then lie upon the plaintiffs either to procure an affidavit from the Greek owner or to satisfy the Court that they have used all practicable means of getting him to make an affidavit and that he has refused. I think they must also in the further and better affidavit deal with those points to which I have already referred and upon which the affidavit appears to me to be quite insufficient.

The appeal must be allowed, and the further affidavit ordered, and the trial must be adjourned until the order has been sufficiently complied with.

SCRUTTON L.J. I agree. This is an appeal against an order refusing to order a further affidavit of ship's papers to be made and refusing to postpone the trial. The subject matter of the case, on which I express no opinion, as I have no materials for forming one, is the alleged total loss of a Greek ship, insured for between 300,000*l.* and 400,000*l.*, by a mine some very considerable time after mines ceased to be used on the seas. The underwriters allege, whether correctly or not I do not know, that just about this time, when insured values were much above the market values of shipping, an extraordinary multitude of disasters fell upon Greek ships, including this one, by which mines attacked them in places where fortunately no loss of life occurred to the crew and where incidentally the loss of the ship was a gain to her owner.

(1) 2 Q. B. D. 624.

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Such a case is obviously one in which the underwriters are entitled to the fullest investigation.

One of their means of investigating is the affidavit of ship's papers, which strikes any one not accustomed to marine insurance as an odd proceeding until its history and the reasons for it are explained. An order for ship's papers is strictly limited to marine insurance. A contract of marine insurance is a contract of the greatest good faith. When a loss occurs the underwriters know nothing about the circumstances, and the owner and persons interested may know everything. When the contract of insurance is made it is the duty of the owner to make the fullest disclosure of every material fact to the underwriters; not merely to abstain from active misrepresentation but to tell the underwriters all the material facts he knows; and consequently for centuries it has been the practice in actions on policies of marine insurance, to order the assured as soon as the writ is issued to make by himself and procure other persons interested to make an affidavit of ship's papers which should disclose not only every document in his possession but every document in the possession of those interested, though they are not known to himself, or else he must show that he has made every endeavour to obtain those papers and has been unable to obtain them; and his action is stayed until he has complied with the order. It is of the greatest importance to marine insurance and to the existence of underwriters that this security of theirs should be preserved. In this case it seems to me quite clear that the plaintiffs, against whom no charge whatever is made, and their advisers have not understood what is meant by an affidavit of ship's papers. It does not mean that the assured may wait until he is asked by the underwriters to disclose a document, which appears to be one of the untenable positions taken up by the plaintiffs in this case; it does not mean that the assured may withhold material documents merely because he thinks they are not material. He must make the fullest disclosure of documents that he has in his possession, and if the documents are in the possession of other persons interested he must do his utmost

to get them and explain on affidavit, if he has not been able to get them, what he has done to get them and why he has not been able to get them; and he must account on oath for the disappearance of documents which have been but are no longer in the possession of himself or persons interested. This last remark is peculiarly relevant in this case, because it is alleged that the disaster which sent this ship to the bottom sent with her all her logs and all the documents connected with her voyage. If so the affidavit of ship's papers must deal with the matter. The writ in this action was issued on a policy of 20,000*l.* The plaintiffs are mortgagees. Their actual interest under their mortgage is said to be about 140,000*l.* It appears the ship was insured for between 300,000*l.* and 400,000*l.*, and at a very early stage, as is very proper and right in this action, a consolidation agreement was made by which the underwriters on the whole 300,000*l.* or 400,000*l.* were bound by the result of the action. The person interested in the balance over and above 140,000*l.* is the owner. It is therefore a case in which it is essential that the owner should be concerned in the affidavit of ship's papers. I am quite satisfied that so far the plaintiffs have not complied with the order for an affidavit of ship's papers. They have not shown the efforts that they have made to obtain the papers in the possession of other persons interested or the results of those efforts. They have not shown on oath that the documents in the possession of the persons interested have now ceased to be in the possession of those persons, and they seem to me to have completely misunderstood the materiality of the current account. It is perfectly true that there is a mortgage with a sum indorsed on it for 145,000*l.* That sum may not be right. It may have been paid off. The current account is therefore a most material document, and I cannot conceive why it was not mentioned in the first affidavit of ship's papers. Therefore, there are abundant grounds for making the order for a further and better affidavit of ship's papers against the plaintiffs; but further the owner on the facts stated is interested to a very large extent, and he also should be ordered to make

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an affidavit of ship's papers and the action should be stayed until that has happened. The learned judge below, I understand, refused to make the order on the owner relying on the decision of *Fraser & Co.* v. *Burrows* (1) decided in 1877. When the Judicature Acts came into force there was for some time a question in this as well as in other matters of their effect on the preceding practice, and one of the questions was whether an order for discovery had superseded the marine insurance practice as to ship's papers. In *Fraser & Co.* v. *Burrows* (1) Cleasby B., to whose knowledge of marine matters I need add nothing to the testimonial given by Lord Esher, made the ordinary order under the old form for an affidavit by the owner of ship's papers. It was objected that the Judicature Acts did not allow such an order; that the owner was out of the jurisdiction of the Court, and ought not to be ordered to make such an affidavit. Kelly C.B. and Field J. relying on the procedure of the Judicature Acts declined to make such an order. Two months later a similar case, an action by a mortgagee, came before Kelly C.B. Again it was argued that the only order for discovery that should be made on the mortgagee was an order to produce documents in his possession. Of course the ship's papers in his possession were practically none. On that occasion Cleasby B. was sitting with Kelly C.B. and was able to inform him of the old practice. In the result the Chief Baron went back on his former decision and adopted the old practice as explained to him by Cleasby B. In 1881, four years later, the matter came before the Court of Appeal, including Jessel M.R., who had been the chairman of the committee which drafted the Judicature Rules, and Lord Esher, then Brett L.J., whose familiarity with marine insurance matters needs no vouching from me, and they adopted the view taken in the second case that the procedure in marine insurance was not affected by the provisions of the Judicature Acts. In my view *Fraser & Co.* v. *Burrows* (1) was wrongly decided and should no longer be followed.

This is peculiarly a case where the plaintiffs and all persons

(1) 2 Q. B. D. 624.

interested should be ordered to make an affidavit of ship's papers and the order should be enforced on the owner who is largely interested in these policies. The plaintiffs must make a further affidavit; an affidavit must also be made by the owner as a person interested; documents which were, but are no longer in the possession of the persons interested must be accounted for; the plaintiffs must show on oath what steps they have taken to obtain documents from those interested, and the result of their efforts, and there must be a stay until the order is complied with. I am not deciding what will happen or under what circumstances that stay can be removed; it may be that if no affidavit can be obtained from the owner the plaintiffs may be allowed to go on. Speaking for myself I should require to be very thoroughly satisfied that the owner could not be induced to make the affidavit before I allowed this action to go on; a merely formal statement of request and refusal would certainly not satisfy me.

ATKIN L.J. I agree with both the judgments which have been delivered, and it seems unnecessary to repeat what has already been said. I merely desire to call attention to two points. First of all, I think attention should be directed to the form of order to be used in the Commercial Court when an order for ship's papers is made. Form 19 in Appendix K to the Rules does not seem to me to be a satisfactory form at the present day.

I would only add my agreement with the other members of the Court that *Fraser & Co.* v. *Burrows* (1) must now be taken to be overruled.

Appeal allowed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondents: *Thomas Copper & Co.*

(1) 2 Q. B. D. 624.

W. H. G.

1921
Dec. 20.
1922
Jan. 13.

In re WILKINSON.

Insurance (Unemployment) — Employed Persons — Domestic Service — Charwoman engaged in cleaning Solicitor's Office—"Employed in any trade or business"—Unemployment Insurance Act, 1920 (10 & 11 *Geo.* 5, *c.* 30), *Sch. I., Part II.* (*b*).

A charwoman was employed by a solicitor at a weekly wage to clean his office, and for this purpose she attended daily before and after office hours:—

Held, that she was not an insurable person within the Unemployment Insurance Act, 1920, for, even assuming that the solicitor's occupation was a "business" within Sch. I., Part II. (*b*), of the Act, she was employed in domestic service and was not employed in the solicitor's business.

Ex parte Woollands [1921] W. N. 247 distinguished.

REFERENCE by the Minister of Labour, under s. 10 of the Unemployment Insurance Act, 1920, of question for the decision of the Court.

The question referred was whether Mrs. Randall, a charwoman, who was employed at a weekly wage to attend daily in cleaning, before and after office hours, the office of Mr. Wilkinson, a solicitor, in Lincoln's Inn, was an employed person within the meaning of the Act so as to be insurable. (1)

Sir Gordon Hewart A.-G. and *C. W. Lilley* for the Minister of Labour. First, Mrs. Randall is not employed in domestic service, a "domestic" being one who resides in the house of the employer: see Stroud's Judicial Dictionary sub voce "Domestic" and *Ogle* v. *Morgan*. (2) She does not reside at her employer's house, and is accordingly an insurable person under the Act.

Secondly, even assuming that Mrs. Randall is employed in domestic service, she is employed in a business carried

(1) Unemployment Insurance Act, 1920, s. 1, provides that all persons of the age of sixteen and upwards engaged in any of the employments specified in Part I. of the First Schedule, "not being employments specified in Part II. of that schedule . . . . shall be insured against unemployment in manner provided by this Act."

Sch. I., Part II., enumerates excepted employments, these including "(*b*) employment in domestic service, except where the employed person is employed in any trade or business carried on for the purposes of gain."

(2) (1852) 1 D. M. & G. 359.

on for the purposes of gain and so is insurable. In *In re David* (1) and *In re North and Ingram* (2), where it was held that a school was not a "business" within the Act, the view was indicated that "business" did not include a profession. While for some purposes that may be so, it is not so in applying the provisions of the Unemployment Insurance Act, 1920, which is based upon the National Insurance Act, 1911, the object being to apply to all kinds of business except those specifically excluded. In *Doe* v. *Keeling* (3) a school was held to be a "business" within the meaning of a covenant against using premises for any trade or business. So, too, in *Rolls* v. *Miller* (4), a charitable institution was held to be a "business" under a similar covenant. In *Smith* v. *Anderson* (5) Sir George Jessel M.R. said that "anything which occupies the time and attention and labour of a man for the purpose of profit is business."

[ROCHE J. The Court of Appeal in that case did not agree with Sir George Jessel's decision.]

In *Barker & Sons* v. *Inland Revenue Commissioners* (6) stockbrokers in buying stocks and shares were held to carry on a business, and not a profession, for the purposes of excess profits duty. While no one would speak of a solicitor as being in trade, he is spoken of as being in business, and in the north a client frequently speaks of his solicitor as his "man of business." It is submitted, therefore, that a solicitor's occupation is a "business" for the purposes of this Act. Much of the work of solicitors is not referable entirely to law; for example, they frequently act as managers of estates and also in raising capital for companies.

Thirdly, if Mr. Wilkinson, as a solicitor, carries on "business" within the meaning of the Act, Mrs. Randall is employed in the business, as her work immediately subserves the business that is carried on. On this point the case is governed by *Ex parte Woollands*. (7)

(1) Ante, p. 172.
(2) Ante, p. 188.
(3) (1813) 1 M. & S. 95.
(4) (1884) 27 Ch. D. 71.
(5) (1880) 15 Ch. D. 247.
(6) [1919] 2 K. B. 222.
(7) [1921] W. N. 247.

1921

WILKINSON, *In re.*

R. S. T. Chorley for the solicitor. On the first point, Mrs. Randall clearly is employed in domestic service. The duties she performs are wholly of a domestic character, being the same as those performed by a servant in a private house. The fact that the solicitor does not reside on the premises is immaterial.

Secondly, the solicitor is not employed in "business" within the Act. He carries on a profession and not a business. Where the Legislature intends to deal with professions as distinct from trades and businesses it does so in terms; see, for example, s. 13, sub-s. 1, of the Customs and Inland Revenue Act, 1878, and see also the observations of Scrutton L.J. in *Inland Revenue Commissioners* v. *Maxse*. (1) A solicitor is an officer of the Court, and his profession is to assist in the administration of the law.

Thirdly, in no sense can it be said that a charwoman whose duty it is to clean a solicitor's office is employed in his business, even assuming it can be said that his occupation is a "business" within the Act.

Lilley replied.

Cur. adv. vult.

1922. Jan. 13. ROCHE J. This case raises the question whether a charwoman, or, as she is called in the Inns of Court, a laundress, employed in cleaning a solicitor's office, is an insurable person under the Unemployment Insurance Act, 1920.

Mr. Wilkinson, who practises as a solicitor in Lincoln's Inn, employs Mrs. Randall at a weekly wage to clean his office. Her functions are to clean and dust the office, light the fires, and generally to attend to those matters necessary for the comfort and convenience of Mr. Wilkinson and his staff. Her work is done daily before and after office hours; she is not present during office hours.

Three points were taken in argument; first, is Mrs. Randall a person employed in domestic service? Secondly, is Mr. Wilkinson's practice or occupation a "business" within

(1) [1919] 1 K. B. 647, 657.

the meaning of the Act? And, thirdly, assuming that Mr. Wilkinson's practice is a "business," and assuming, further, that Mrs. Randall is employed in domestic service, is she employed in the business of Mr. Wilkinson?

As to the first point, I hold that Mrs. Randall is employed in domestic service. She renders precisely the kind of service which I regard and, in previous cases, have held to be, domestic service.

The second point, whether Mr. Wilkinson's occupation is a "business" within the meaning of the Act, is not so easy. It is unnecessary, however, in view of the conclusion I have arrived at on the third point, to decide this finally, and I do not propose to do so. A case may possibly arise in which it will be necessary for me to give a decision upon it. At the same time it may assist both the Minister of Labour and those concerned in these matters if I indicate, without concluding myself, that my present view is that a solicitor's practice, conducted at any rate as this practice is, is a "business" within the meaning of the Act. The Attorney-General has invited me to hold that, for the purposes of this Act, a "business" includes any occupation, profession or calling by which the person engaged in it seeks his livelihood or practice. That is contrary to the view I have already expressed in *In re David* (1) and *In re North and Ingram* (2), and from the view there expressed I do not recede. At the same time, my present view is, as I have said, that a solicitor's practice, at any rate in London, is a pursuit upon lines sufficiently commercial to bring it within the term "business" as distinguished from an occupation such as that of a schoolmaster which is not organized and conducted upon commercial lines.

The third is the crucial point: On the assumption that Mr. Wilkinson's occupation or practice is the conduct of a business, is Mrs. Randall employed in that business? On behalf of the Minister of Labour it was said that the point was concluded by what I said in *Ex parte Woollands*. (3)

(1) Ante, p. 172. (2) Ante, p. 188.

(3) [1921] W. N. 247.

1922

WILKINSON, *In re.*

Roche J.

Perhaps I can best indicate the grounds of my decision in this case by considering what I decided in *Ex parte Woollands* (1), and how and why, the present case is distinguishable from that. Messrs. Woollands, the well-known drapers, conduct their business, so far as their assistants are concerned, on what is called the living-in system, that is to say, the assistants live not under the same roof as that under which the drapery business is conducted, but they sleep in houses, or hostels, conveniently adjacent. They have their meals on the business premises, that is to say, in the draper's shop or store. The employees there in question were the staff who, during the evenings, attended to the living and sleeping houses, and during the day served and waited upon the assistants in the staff rooms in the shop. I held that the employees in question were domestics, and that they were employed in the drapery business. I rejected Messrs. Woollands' contention that they were conducting, first, a drapery business with a view to profit, and, secondly, carrying on something not with a view to profit—namely, a boarding establishment for their assistants. I held the business to be one and indistinguishable. The living-in system was adopted not merely for the benefit of the assistants, although no doubt that consideration influenced Messrs. Woollands, but was adopted because it was found to be better adapted for the efficiency of their assistants and for the efficiency of the business. I held, therefore, that the business could not be divided into two parts, and that those through whom or through whose work the living-in system was conducted were just as much a part of the drapery establishment as any of the other assistants. That was the sole ground of my decision. The present case is distinguishable. It is quite true that civilised beings cannot usefully and agreeably conduct their practice or business in an office which is not clean or without fires, but at the same time it would be stretching language to hold that a person who, out of office hours, performs certain services for those who carry on the business, is employed in the business.

(1) [1921] W. N. 247.

In the course of the argument the case was discussed of the laundress or caretaker who performs the like service for a member of the Bar, and Mr. Lilley, I think, agreed that it would surprise a barrister to be told that the laundress was employed in the carrying on of his profession. There is something analogous between the functions of such a person and those of a chauffeur who drives a member of the Bar or a solicitor daily to his place of business, but it would be unduly straining language to hold that the chauffeur was employed in the business. It is true that the charwoman begins where the other ends. But, in truth, the charwoman is engaged in something different from the business; she is engaged in equipping the place of business, making it ready for the conduct of the business, and she is not, in my judgment, employed in the business itself. On that ground I hold that Mrs. Randall is not insurable. The matter may be looked at from the point of view of the charwoman. If she were asked what she was employed in, I apprehend the answer would be not that she was employed in a solicitor's business, but that she was employed in preparing and cleaning the rooms of the solicitor. To prevent misapprehension I wish it to be clearly understood that my decision is not based solely on the ground that Mrs. Randall is a part-time employee. Although the part-time nature of the employment is an element to be considered, it is not the crucial test, and does not provide a simple dividing line by which one can separate a person employed in the business from one who is not. The result is that I hold that Mrs. Randall is not insurable.

Solicitors: *Solicitor to Minister of Labour; B. Wilkinson.*

J. S. H.

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[IN THE COURT OF APPEAL.]

SMITH *v.* HOWES.

[1921. S. 608.]

Costs—Taxation—Disbursements—Action on Bill of Costs—Judgment subject to Taxation—Disbursements made after Date of Bill—"Proceedings in which the taxation takes place"—"Proceedings for taxation"—Proceedings "commenced by the client"—Rules of Supreme Court, Order LXV., *r.* 27 (29A).

By Order LXV., r. 27 (29A), of the Rules of the Supreme Court in taxations under the Solicitors Act, 1843, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out the unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed if they are actually made before the commencement of the proceedings in which the taxation takes place and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client: Provided that if the proceedings for taxation shall have been commenced by the client or a third party, payments made by the solicitor pending such proceedings in discharge of any such antecedent liability so set out in the bill (including counsel's fees) may be allowed if actually made before the commencement of the taxation.

A solicitor issued a specially indorsed writ and a summons for judgment against his client upon a bill of costs. On March 23, 1921, an order was made under Order XIV. that the bill should be referred to the Master to be taxed pursuant to the Solicitors Act, 1843, and that the solicitor should be at liberty to sign judgment against the client for the amount found due to the solicitor by the Master's allocatur. The bill expressly stated that certain fees to counsel had not then been paid, and these fees were set out under a separate heading in the bill as indicated by Order LXV., r. 27 (29A). On April 1, 1921, the fees were paid. On April 9, 1921, the taxation commenced. The client objected to the fees being allowed as disbursements, and the taxing Master upheld the objection:—

Held, that the order of March 23 represented the result of two proceedings: (1.) A summons for judgment by the solicitor; (2.) a summons by the client for taxation of the bill under s. 37 of the Solicitors Act, 1843; that therefore "proceedings for taxation" had been "commenced by the client" within the meaning of Order LXV., r. 27 (29A), and consequently that the taxing Master had power to allow the fees.

Smith v. *Edwardes* (1888) 22 Q. B. D. 10 followed and applied.

Order of McCardie J. reversed.

APPEAL from an order of McCardie J. in chambers affirming an order of a taxing Master upon an application for review of a taxation.

The plaintiff, a solicitor, delivered a signed bill of his fees, charges and disbursements to his client, the defendant, on June 8, 1920. The bill expressly stated, as indicated by Order LXV., r. 27 (29A), of the Rules of the Supreme Court (1), that certain fees to counsel, claimed as disbursements, had not then been paid and that those unpaid items of disbursement were set out under a separate heading in the bill.

On February 1, 1921, the plaintiff issued a specially indorsed writ against the defendant for the amount of the bill. On March 23, 1921, an order was made in chambers under Order XIV. of the Rules of the Supreme Court that the bill of costs on which the action was brought should be referred to the Master to be taxed pursuant to the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and that the plaintiff should give credit at the time of taxation for all sums of money received by him from or on account of the defendant, and that the plaintiff should be at liberty to sign judgment against the defendant for the amount (if any) found due to the plaintiff by the Master's allocatur on the said taxation.

On April 1, 1921, the fees were paid. On April 9, 1921, the order of March 23 was carried into the taxing office.

(1) Rules of the Supreme Court, Order LXV., r. 27 (29A): "In taxations under or pursuant to the Solicitors Act, 1843, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out such unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed by the taxing Master if they are actually made before the commencement of the proceedings in which the taxation takes place, and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client. For the purposes of computation of one-sixth thereof, such bill shall be deemed to include such unpaid items as part of the bill.

"Provided also that if the proceedings for taxation shall have been commenced by the client or a third party, payments made by the solicitor pending such proceedings in discharge of any such antecedent liability so set out in the bill (including counsel's fees) may be allowed by the taxing Master if actually made before the commencement of the taxation, if it appears to him that such payments have been properly made and that no injustice is done thereby. . . . ."

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The bill was taxed in pursuance of that order and the fees to counsel were included therein as disbursements. The defendant objected on the ground that, the taxation being under the Solicitors Act, 1843, the fees were not chargeable against the defendant unless actually paid before the commencement of the proceedings.

The taxing Master acceded to the defendant's objection and disallowed the fees, stating at length his reasons and concluding thus :—

" The position then with regard to a solicitor's bill of 'fees, charges and disbursements' (the words of s. 37 of the Solicitors Act, 1843) in which are included disbursements . . . . which have not been paid when the bill is delivered to the client, or to the party chargeable therewith, or to the party liable therefore appears to be as follows :—

" 1. If the bill does not 'set out such unpaid items of disbursement under a separate heading in the bill' and 'expressly state that they have not then been made' they cannot be recovered at all : *Sadd* v. *Griffin*. (1) It is not sufficient that the statement that they have not then been paid is made in a letter accompanying the bill : *In re Hildesheim*. (2)

" 2. If the bill contains the statements prescribed by Order LXV., r. 27 (29A), and the solicitor sues after the expiry of a month from delivery, the disbursements must be actually made before the issue of the writ.

" 3. If the bill contains the prescribed statements and the solicitor applies for taxation the disbursements must be actually made before the presentation of the petition or the issue of the summons for an order for taxation.

" 4. If the bill is taxed under an order for which the client applies, the disbursements must be actually made before the commencement of the taxation, that is before the Master deals with any item by way of taxation.

" Unless the disbursements are actually made before the dates above mentioned the Master has no power to allow the amounts claimed as disbursements. If they are made

(1) [1908] 2 K. B. 510. (2) [1914] 3 K. B. 841.

before the appropriate date he may allow them but he is not bound to do so.

"In this case the solicitor is suing for his bill and although the bill contains the statements prescribed by Order LXV., r. 27 (29A), the disbursements claimed were not actually made before the issue of the writ and cannot be allowed on taxation.

"Consequently I allow the objection and disallow the disbursements claimed."

On December 15, 1921, the plaintiff took out a summons before the judge in chambers for an order to review this taxation and to disallow the defendant's objection and allow the fees in the bill of costs. On December 21 McCardie J., the judge in chambers, dismissed the summons.

The plaintiff appealed.

van den Berg for the appellant. The taxing Master was wrong in holding that these fees could not be allowed as disbursements unless they were paid before the issue of the writ. The case comes within the proviso to Order LXV., r. 27 (29A). The "proceedings for taxation have been commenced by the client" within the meaning of that proviso. That follows from *Smith* v. *Edwardes* (1) which makes it clear that the proceedings under Order XIV. by a solicitor on his bill of costs and the order giving him liberty to sign judgment for the amount found due on taxation really involve two, if not three, separate applications; one by the solicitor for judgment; the second by the client for taxation of the bill, and the third by the solicitor for judgment for the amount found due. Therefore the proceedings for taxation are commenced by the client, and this case comes within No. 4 and not within No. 2 of the taxing Master's conclusions.

W. Hanbury Aggs for the respondent. The Court has an inherent jurisdiction to send a bill of costs to be taxed. When a solicitor issues a writ upon a bill of costs he knows that the Court may, and will if the charges are disputed, order that the bill be taxed. The proceedings for taxation

(1) 22 Q. B. D. 10.

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are therefore commenced by the solicitor. It follows that these disbursements not having been paid before the issue of the writ cannot be allowed on taxation.

BANKES L.J. This appeal from chambers raises an important question concerning the construction of the proviso to Order LXV., r. 27 (29A), of the Rules of the Supreme Court. It is common knowledge that this rule was made in order to relax the stringency of the decision in *Sadd* v. *Griffin* (1) according to which a solicitor could not upon taxation be allowed any disbursements unless he had actually paid them before he delivered his bill of costs. Now however, by r. 27 (29A), if the bill of costs expressly states that disbursements set out in a separate heading have not been paid, they may be allowed if made "before the commencement of the proceedings in which the taxation takes place." To that rule there is a proviso that if the "proceedings for taxation" shall have been commenced by the client or a third party, payments made by the solicitor pending such proceedings may be allowed if actually made before the commencement of the taxation. The question in this case is, who commenced the "proceedings for taxation" within the meaning of that proviso?

The appellant delivered his bill of costs and issued a specially indorsed writ and took out a summons under Order XIV. for leave to sign judgment. In drafting his bill he followed the direction in Order LXV., r. 27 (29A), and stated that certain disbursements consisting of fees to counsel had not then been made. The client did not dispute the retainer and was willing to pay the bill subject to taxation. In that state of things the master in chambers, before whom the summons for judgment came, made an order that the bill should be taxed pursuant to the Solicitors Act, 1843. On whose application was that order made? If it was made on the solicitor's motion he cannot bring himself within the proviso. The words in the main part of r. 27 (29A) "the proceedings in which the taxation takes place" would cover

(1) [1908] 2 K. B. 510.

both an action by a solicitor on his bill of costs and a summons by the client to have the bill taxed before the solicitor has commenced any action. In the proviso however different language is used. "Proceedings for taxation" are not apt words to include an action on the bill with a possible taxation as an incident on the way to judgment. It is clear that the proviso was intended to be confined to proceedings initiated with the direct object of obtaining a taxation. Then were proceedings for taxation commenced by the client? In my opinion they were. In *Smith* v. *Edwardes* (1) Lord Esher M.R. clearly pointed out that, strictly speaking, the practice under Order XIV. merges two separate proceedings; first an action by the solicitor, and secondly an application by the client to tax, and that for convenience the Court allows the two proceedings to be merged in one. But that does not alter the character of the proceedings. The distinction between them is preserved by r. 27 (29A) in the difference in language between "proceedings for taxation" in the proviso and "proceedings in which the taxation takes place" in the main part of the rule.

For these reasons I think the taxing Master took too narrow a view of the case. The proceedings for taxation were commenced by the client within the meaning of the proviso and the appeal must be allowed.

SCRUTTON L.J. I agree. I think the taxing Master in his careful statement of this case has arrived at a wrong conclusion; but I am not surprised at that when I consider the language of r. 27 (29A). In order to recover his costs a solicitor must deliver his bill and then wait for a month before commencing proceedings so as to give the client time to consider his position. In 1908 it was decided by the Court of Appeal in *Sadd* v. *Griffin* (2) that he could only recover as disbursements sums which he had actually paid at the time of delivering his bill. That decision was not palatable to the profession, and so in the year following

(1) 22 Q. B. D. 10.

(2) [1908] 2 K. B. 510.

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Scrutton L.J.

r. 27 (29A) was drafted to remove part of the effect of *Sadd* v. *Griffin*. (1) That rule may be described as constructed in three stages. The first stage is a statement of the rule in *Sadd* v. *Griffin*. (1) The second stage consists of a qualification that if the bill states on the face of it that there are payments yet to be made, and sets those items out under a separate heading in the bill, the taxing Master may allow them if they are actually paid before the commencement of "the proceedings in which the taxation takes place." The third stage of the rule is a further qualification upon the rule in *Sadd* v. *Griffin*. (1) It is that if "the proceedings for taxation" shall have been commenced by the client or a third party, the taxing Master may allow the items mentioned on the face of the bill and set out under a separate heading, if they are actually paid before the taxation commences. The earlier expression "proceedings in which the taxation takes place" includes proceedings before any steps are taken to have the bill taxed; but the later expression "proceedings for taxation" is obviously confined to steps taken by some one for taxation of the bill. Before the present practice under Order XIV. was instituted the process was that the solicitor applied under that order for leave to sign judgment for the amount of the bill of costs; then if the client, as in the present case, admitted that the work had been done but disputed the charges, the solicitor's summons would be dismissed, and the client took out a summons for taxation of the bill under the Solicitors Act, 1843; and when the amount of the bill had thus been arrived at another summons would be taken out by the solicitor under Order XIV. This was taking three bites to a cherry, and the Court, as explained by Lord Esher M.R. in *Smith* v. *Edwardes* (2), combined the three proceedings into one and gave the solicitor leave to sign judgment for the amount to be found due on taxation. But this practice still included an application by the client for taxation and the words in r. 27 (29A) "proceedings for taxation" were intended to recognize the existence of this proceeding by the client.

(1) [1908] 2 K. B. 510. (2) 22 Q. B. D. 10, 13.

Therefore I think that the present case is exactly within conclusion 4 in the taxing Master's answer, and this appeal must be allowed.

ATKIN L.J. I agree. The order of March 23, 1921, follows almost word for word the form of order drafted by Fry L.J. in *Smith* v. *Edwardes*. (1) It is an essential part of the order that the bill of costs be referred to the Master to be taxed pursuant to the statute 6 & 7 Vict. c. 73, which has the effect of giving the client the benefit of s. 37 of that Act where one-sixth of the bill is taxed off. Under that section the reference to taxation can only be made on the application of the solicitor or the client. By a subsequent section, s. 38, it may be made on the application of a third party who is liable to pay or has paid the bill. Therefore in an action on a bill of costs wherever this form of order is adopted the order to tax must of necessity be made on the application either of the solicitor, the client, or a third party, as mentioned above. The question is, on whose application was this order for taxation made? The answer is clearly given by Lord Esher M.R. in *Smith* v. *Edwardes*. (1) He said: "The strict practice, no doubt, would be as follows: where a summons is taken out under Order XIV., r. 1, and the defendant raises the same contention as was raised in the present case"—namely, that while admitting that the work had been done he disputes the charges—"the summons would be dismissed, but the defendant would take out a summons for taxation of the bill under the Solicitors Act, and when the amount had been arrived at and the Master's allocatur given, another summons would be taken out under Order XIV., r. 1. But what would be the advantage of such a practice? Upon the first summons under Order XIV. there would be one set of costs; upon the summons to tax there would be another set of costs; and upon the final summons under Order XIV. yet another set of costs. That is a state of things which every Court has used its ingenuity to avoid, if possible; and the heaping up of such unnecessary costs has been avoided without any mischief

(1) 22 Q. B. D. 10, 13.

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Atkin L.J.

by the course of practice adopted. The practice has been, under such circumstances, to treat the powers of the Court or judge as being so enlarged as to enable it to make an order to tax the bill without going through the form of dismissing the summons and then taking out another similar summons after taxation. To that there can be no objection. By the admission of the defendant there will inevitably be judgment against him for an ascertainable sum, which, when ascertained, will enable the plaintiff to proceed under Order XIV. The practice has been, instead of having two summonses, to make an order as though there were a summons to tax the bill of costs under the Solicitors Act; that preserves to the defendant all his rights under that statute; and to treat the summons under Order XIV. as a continuing summons, so that, without making any fresh application, the plaintiff can sign judgment for the amount found due by the allocatur."

It is impossible to read that passage otherwise than as meaning that when the order is made it is as though a summons to tax had been taken out by the client. That is in accordance with common experience and practice; because a solicitor has no intention of applying for taxation. I have little doubt that many judgments are given without a taxation under the Solicitors Act. But if the client applies, then the "proceedings for taxation" have been "commenced by the client" within the meaning of Order LXV., r. 27 (29A). It follows that the solicitor may be allowed on taxation disbursements included in a properly drawn bill of costs if he has actually paid them before the taxation has commenced.

Appeal allowed.

Solicitors for appellant: *Cardew Smith & Ross.*
Solicitors for respondent: *Milner & Bickford.*

W. H. G.

RUFFY-ARNELL AND BAUMANN AVIATION COMPANY, LIMITED *v.* THE KING.

1921
Dec. 6, 7, 8, 9, 12, 13, 15, 16, 20.

[1920. R. 1044.]

Petition of Right—Amendment—Contract—"Duration of war"—Breach—Petitions of Right Act, 1860 (23 & 24 *Vict. c.* 34), *s.* 7—*Termination of the Present War (Definition) Act*, 1918 (8 & 9 *Geo.* 5, *c.* 59), *s.* 1.

The Court has power under s. 7 of the Petitions of Right Act, 1860, to amend a petition of right, the operation of the word "amendment" in that section not being limited to the pleadings of the Crown. An amendment of a petition will however be granted to a suppliant only if the substance of the case after amendment is the same, if e.g. the proposed amendment is a mere change of date or of amount, or a mere variation in the formulation of the contract; it will not be granted where the suppliant seeks to substitute or add a substantially new cause of action without a fiat by the King or a consent by the Attorney-General.

By s. 1 of the Termination of the Present War (Definition) Act, 1918: "His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and the present war shall be treated as having continued to, and as having ended on that date for the purposes of" certain provisions, "and, except where the context otherwise requires, of any provision in any contract . . . . referring . . . . to the present war or the present hostilities."

In August, 1916, the War Office made a contract with the suppliants "for the duration of the war" to train pupils for flying at their school. Under the contract the Government had the duty of bona fide considering and deciding the efficiency and capacity of the suppliants' school, and in deciding how many pupils should be sent to the school. The Government on June 24, 1918, determined the contract as from July 1, 1918. The suppliants claimed compensation for their loss of profits:—

Held, that the word "context" in the Act of 1918 did not mean the immediate context to the words "duration of the war," but meant the context of the whole of the contract, and that, having regard to the nature, object and terms of the contract in question, the parties could not have intended that the obligations of the Government should continue till the official termination of the war in August, 1921, but that they contemplated as the duration of the war the substantial continuance of active hostilities and that therefore the proper date to take was December 14, 1918, when the armistice was renewed.

Held that as the Government had bona fide decided on good grounds not to send any more pupils to the suppliants' school, therefore the suppliants were not entitled to damages for the loss of pupils after June 30, 1918, but that the suppliants were entitled to general damages for the inconvenience, trouble and expense caused by the Crown's breach of contract in so abrupt a manner.

1921

RUFFY-ARNELL, &c., Co. v. THE KING.

PETITION OF RIGHT tried by McCardie J.

The suppliants for some time before 1916 carried on a school of aviation at Hendon. On August 12, 1916, the War Office made a written offer to the company. The material clauses were as follows :—

2 : "As a temporary measure and for the duration of the war such schools as agree voluntarily will be placed under direct military supervision and allotted pupils in numbers which can be trained efficiently with the resources and equipments available."

3 : "At the same time the acceptance by the schools of any pupils other than those ordered to them by the War Office will be prohibited."

4 : "The schools will naturally be allowed to exercise the option of retaining their present pupils until such time as they have qualified for the Royal Aero Club's certificate."

5 : "It must be understood that the War Office is the deciding authority as to the capacity of each school for training purposes, and that the periodical visits of the inspecting officer may result in a reduction or augmentation of the number of pupils under training."

Clause 8 provided for payment of "100*l.* in respect of each pupil who has completed not less than five hours flying" and an extra "25*l.* bonus in respect of each pupil who obtains the revised certificate of the Royal Aero Club."

The document concluded thus : "If, therefore, you are prepared to accept the foregoing conditions it is requested that the attached paper of agreement, etc., may be completed signed and returned without delay."

The paper attached to the letter of August 12, 1916, was on August 16, 1916, duly completed, signed and returned by the suppliants. It began : "It is hereby agreed." It then stated various terms which need not be set out except clause 3 which said : "The capacity of the school is twelve pupils." This referred to the then existing capacity of the school. McCardie J. held that the documents constituted a binding bargain. Pursuant to this bargain the suppliants began to train pupils in elementary flying under the contract just

stated. In the early part of the year 1917 they removed the school to Acton. They took a lease of land, erected huts and other buildings at substantial expense and generally enlarged the operations of the school. The War Office increased the number of pupils sent by them to the suppliants for training. The suppliants again and again asked for more pupils. The War Office steadily increased the numbers.

By letters of January 11, 1918, and February 13, 1918, the War Office proposed to vary the contract by increasing, subject to certain conditions, the 100*l.* per pupil to 135*l.* This latter amount added to the 25*l.* (the original bonus) made a total of 160*l.* per pupil. This proposed variation was accepted by the suppliants on March 4, 1918.

About this time the powers and duties of the War Office were taken over by the Air Council pursuant to the Air Force (Constitution) Act, 1917 (7 & 8 Geo. 5, c. 51). Henceforward the Air Council became the representative department of the Crown for the purposes of the contract with the suppliants.

On June 24, 1918, the Air Council wrote to the suppliants that "in consequence of the changes which have taken place in training requirements now demanded by the Royal Air Force it has been decided to determine the existing agreement with the company in respect of the school of aviation belonging to the company at the London Aviation Ground, Acton." The letter enclosed the following notice: "I herewith give notice that the existing agreement with Ruffy-Arnell & Baumann Co., Ld., in respect of the school of aviation belonging to the aforesaid company at the London Aviation Ground, Acton, is determined as from the 1st of July, 1918. Given under my hand this 22nd of June, 1918. N. C. H. Drew, Brigadier-General, Director of Air Organisation." Thus the Crown gave about six days' notice to terminate this important agreement. It is clear from the correspondence (see the letter of December 1, 1919) that the Crown wrongly believed that the contract contained a clause giving them power to terminate the agreement at any time by notice. Such a clause (known as clause 17) was in fact contained in certain other contracts made with other aviation

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schools. The plaintiffs protested, but the Crown held to their decision. Not a single further pupil was sent to the suppliants.

The suppliants thereupon brought this petition, in para. 2 of which was set out the terms of the letter from the War Office to the suppliants of August 12, 1916, and in para. 3 the terms of "the attached paper of agreement" referred to in that letter. In para. 4 the suppliants said that their school was used to its full capacity for the training of pilots for the Royal Flying Corps and the Royal Air Force in accordance with the terms of the contract, and that they were at all times ready and willing to continue to perform their obligations under the contract for the full term therein provided—namely, the duration of the war—but that the Air Council, by letter of June 24, 1918, in breach of the agreement, terminated the contract as from July 1, 1918. Para. 6 of the petition was as follows: "By reason of the matters aforesaid your suppliants have been deprived of the benefit of the said contract since the 1st of July, 1918, and have lost the profits which they would have earned under the said contract being at the rate of 40,000*l.* per annum for the duration of the war."

The Attorney-General in his answer denied that the War Office undertook to send to the suppliants' school any pupils, or alternatively any more pupils than the War Office in its sole discretion considered the school capable of training adequately; and he said that the suppliants' school had by June 24, 1918, become incapable of training any pupils adequately. He also denied that the Air Council, by giving the notice of June 24, 1918, or otherwise had committed any breach of contract. He also counterclaimed for 1227*l.* 15*s.* 4*d.*, the price of goods sold and delivered by the Minister of Munitions to the suppliants.

At the hearing of the petition counsel for the suppliants asked leave to amend the petition. The proposed amendment was as follows: "By an agreement in writing between the suppliants and the Crown contained in three letters dated January 11, February 13, and March 4, all in the year 1918, the contract set out in paras. 2 and 3 of the petition was

varied by providing that the normal training fee of 100*l.* stipulated in the said contract should, as from October 1, 1917, be 135*l.* for the considerations appearing in the said letters."

Upjohn K.C. and *Craig Henderson* for the suppliants.

Sir Gordon Hewart A.-G. and *Giveen* for the Crown.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

1921. Dec. 20. McCARDIE J. read the following judgment. This is a petition of right by an aviation company claiming compensation against the Crown for breach of contract. The claim is heavy. The hearing of the case has occupied many days.

Before dealing briefly with the several questions which arise on the written arrangements forming the basis of the claim, I think it well to state and decide a point which has been fully argued for the first time, and which the Attorney-General, for the Crown, and Mr. Upjohn K.C., for the suppliants, both deem to be of considerable constitutional importance. It arises in this way. The petition sets out (in paras. 2 and 3) two documents, dated respectively August 12, 1916, and August 16, 1916, as constituting the contract. In opening the case Mr. Upjohn stated that he would probably ask, at a later stage, for leave to amend the petition. Subsequently he made a definite request to do so. [His Lordship read the proposed amendment.] If this were an ordinary commercial action I should allow the amendment almost as a matter of course. The letters mentioned in the amendment are a part of the well-known correspondence between the parties. They are a portion of the plain sequence of events. No possible objection on the ground of surprise can be, or is, raised by the Crown. The letters, moreover, go in their main substance to the question of damages only. The Attorney-General, however, opposed any amendment of the petition. In the view he takes of the case, he states it to be his duty to stand firmly on what he submits to be the strict rights of the Crown. He powerfully argued (with

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the aid of his learned and able junior, Mr. Giveen) that the Court has no power whatever to amend a petition of right save with the consent of the Crown. That consent was here refused. Mr. Upjohn, on the other hand, contended with incisive vigour, that the Court possessed power to amend a petition of right without the consent, and against the will of the Crown as represented by the Attorney-General. The petition was presented under the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34). I may point out that s. 18 of that Act provided: "Nothing in this Act contained shall prevent any suppliant from proceeding as before the passing of this Act." The old procedure was discussed at length in *Baron de Bode's Case.* (1) I mention this because of the interesting arguments presented to me with respect to what I may call a common law power of amendment. The Statutes of Jeofails were referred to, so called because in the old days of oral pleading a pleader who perceived any slip in the form of his allegation could acknowledge his error by the expression "J'ay faillé" (2), and under those statutes could obtain liberty to amend: see Stephen and Pinder on Pleading (1860), 6th ed., p. 87, and note (*e*). The question of common law amendment is well discussed in Tidd's Practice (1828), 9th ed., pp. 696 and 697, and is illuminated in Comyns' Digest, title "Amendment." The power to amend has been a plant of slow growth. The state of the law at or about the time when the Petitions of Right Act, 1860, was passed may be seen in Lush's Practice of the Courts, 3rd ed., p. 439. I do not dwell further on this point, because it is plain that a petition presented under the Act of 1860 is subject to the procedure laid down by that statute. It seems clear that the object of that enactment was to assimilate, as nearly as may be, the proceedings under a petition of right "to the course of practice and procedure now in force in actions and suits between subject and subject." The earlier sections of the Act

(1) (1845) 8 Q. B. 208.

(2) *Sic* in Stephen, wrongly; "faillé" should in any case be "failli": but Blackstone, iii. 407, correctly gives the present "jeo faile."—F. P.

prescribe the form of the petition, and the procedure to obtain the King's fiat. Sect. 6 deals with the answer to the petition, and provides that the answer, plea or demurrer is to be "as if such petition in a Court of equity were a bill filed therein, or if the petition be prosecuted in a Court of common law as if the same were a declaration in a personal action." Sect. 7 is vital. It is the basis of Mr. Upjohn's argument. It is this: "So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: Provided always, that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act." The suppliants therefore contend that an express power of amendment is given to the Court, and that the result of s. 7 is to confer the wide jurisdiction as to amendment indicated by the Judicature Acts, and powerfully illustrated by Order XXVIII. of the Rules of the Supreme Court. The decisions on that Order, and those it replaced, show the ample area of remedial capacity bestowed upon the Court at the present day. The Attorney-General, however, submits that the power of amendment given by s. 7 extends only to the pleadings delivered by the Crown, and that it does not cover a suppliant's petition of right. He firmly, though courteously, disputes that the Court possesses any jurisdiction at all (save by consent) to amend a petition of right in any respect. Dates, figures, and all allegations whatsoever are, he contends, stricken with final crystallisation when once the fiat has been given. A suppliant, it is

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said, must stand or fall by the petition as it existed when the fiat was signed by the King's hand. The Attorney-General points to the opening words of s. 7—namely: "So far as the same may be applicable, and except in so far as may be inconsistent with this Act"; and he adopts as his own argument the words at p. 390 of Robertson's Civil Proceedings by and against the Crown. They are these: "Can a petition of right be amended? The Crown has granted its fiat to a particular petition, and it is obviously not within the subject's competence to amend it into something else without the Sovereign's leave, in spite of s. 7 of the Act." If this view be correct I must refuse Mr. Upjohn's application for amendment. It is curious that there is no direct authority of judge or Court of Appeal on the matter. Three cases only are cited in Mr. Robertson's book at p. 390. Two of them appear to have been before a Master at chambers, and neither is clear. In the third case, *In re Viscount Canterbury* (1), the petition was amended by consent of the Attorney-General. Apparently that consent by the Attorney-General in Court was treated as equivalent to the fiat of the Queen. In Halsbury's Laws of England, vol. x., p. 33, appears the definite statement that "a petition of right cannot be amended, unless a fresh fiat is obtained to the amended petition." A note to that page adds: "Obviously the suppliant has no right to prosecute a claim which is not the same as the claim which the fiat permitted him to prosecute, and s. 7 of the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), cannot affect this." I observe that one of the chief writers of this part of Lord Halsbury's work was Mr. Stuart Robertson, the very able author of the work on Civil Proceedings by and against the Crown, already cited by me. In *Royal Mail Steam Packet Co.* v. *The King* (2), the suggestion of the Attorney-General that a petition of right could not be amended appears to have been incidentally accepted without argument by Bailhache J. In that case, however, s. 7 of the Act of 1860 was not even mentioned. Upon appeal (3) the

(1) (1840) 1 Coop. temp. Lord Cottenham 143.

(2) (1921) 37 Times L. R. 554.

(3) Ibid. 897.

point did not arise. So the matter stands, so far as authority is concerned. The basis of the Attorney-General's argument is that it is the privilege or prerogative of the Crown to decide whether it be sued or not. Sect. 2 of the Act of 1860 provides that the petition is to be left with the Home Secretary in order that it may be submitted to the King for his gracious consideration. It has been held that the Home Secretary is not liable to an action at the suit of the suppliant for advising the King not to grant his fiat: see *Irwin* v. *Grey*. (1) It is probable, however, that a mandamus will lie to the Home Secretary to compel him to submit a petition to the King: cf. *In re Mitchell* (2), with *Fulton* v. *Norton*. (3) I presume that the King, by his advisers, has a discretion as to whether he will grant or refuse the fiat. It must never be forgotten, however, that the petition is a petition of right. In recent days several Government departments have contracted with the utmost freedom. In some respects they have become, to a large extent, trading departments. Hence the attitude to be adopted by the Courts towards petitions of right is of vital moment. I conceive that the prerogative of the Crown is one to be exercised in furtherance of justice. It was observed in Staundford's Prerogative, c. 22, fol. 72, that a petition of right is so called "because of the right the subject hath against the King by the order of his laws to the thing he sueth for." The matter is dealt with in Clode's Law of Petition of Right (1887), p. 24, and the first chapter of that work discusses with acuteness and learning the question whether or not in olden days the Crown was liable to an action at the suit of the subject. I need not decide that question now. It is of deep historical interest.

I think that s. 7 of the Act of 1860 must be considered in the light of the considerations I have mentioned. In my opinion that section is sufficiently wide to give power to the Court to amend a petition of right. I see no good

(1) (1862) 3 F. & F. 635. (2) (1896) 12 Times L. R. 324, 458.
(3) [1908] A. C. 451.

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reason for limiting the operation of the word "amendment" to the pleadings of the Crown. The whole object of the Act was to strengthen the rights of the subject against the Crown, and to give the subject a more speedy, inexpensive, and satisfactory way of vindicating his claims. To deprive the Court of the power of amendment might lead to grievous hardship and a serious waste of time and expense. The decisions upon various parts of s. 7 favour, I think, the view I have expressed. I do not rely on *Crossman* v. *The Queen* (1), where the special case may have been stated by consent. But in *Marconi's Wireless Telegraph Co.* v. *The King* (2), the Court of Appeal appeared to assume that the Court possessed a discretion as to whether it should apply the ordinary procedure of an ordinary action to the trial of a petition of right. So, too, in *Anglo-Newfoundland Development Co.* v. *The King* (3), the Court of Appeal again appeared to assume that the effect of s. 7, taken in conjunction with s. 4 of the Arbitration Act, 1889, was to bind the Crown as much as it bound the subject upon the question of staying proceedings. I shall not dwell further on the able arguments addressed to me for the Crown and for the suppliants save to mention two points. They are these: (1.) Order XXVIII., r. 1, appears to me to give a just basis for applying the power of amendment. It provides that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." The contention of the Crown that rr. 2 and 3 of that Order (giving certain rights to amend without leave) are subversive of the contention of the suppliants as to the power of the Court to allow amendment is, I think, met by the fact that r. 4 of Order XXVIII. gives ample power to the Court to disallow any amendment which is not permissible. (2.) I think that any amendment which the Court may allow should not, and, indeed, cannot, be one which defeats the provisions of ss. 1 and 2 of the Act of 1860. By this limitation the privileges of the Crown

(1) (1886) 18 Q. B. D. 256. (2) [1918] 1 K. B. 193.
(3) [1920] 2 K. B. 214.

are amply guarded. If the suppliant seeks to substitute or add a substantially new cause of action no amendment should be allowed in the absence of a fiat by the King, or a consent by the Attorney-General. But if the proposed amendment is, e.g., a mere change of date, or of amount, or a mere variation in the formulation of a contract, then I think that ordinarily the amendment should be granted. If the substance of the case is the same the Court can help the suppliant by amendment. If the substance of the case is changed the Court must refuse its aid for that purpose unless the consent of the Attorney-General be given. In the present case I cannot doubt that if the petition as amended had at an early stage been presented for a fresh fiat a grant of the fiat would at once have been made. I allow the amendment as drafted by Mr. Upjohn, and I see no reason for imposing any special terms. I give this ruling with a full sense of responsibility. I yield to no one in my respect for the Royal Prerogative. In many ways it is a gracious feature of our constitution. But it exists not as a mere instrument for the enforcement of technicalities but rather as a beneficent instrument for the furtherance of the public weal. There is no higher good than the complete and ready application of the rules of a just procedure not only as between subject and subject but also as between the Crown and those who, as subjects, seek the aid of His Majesty's Courts of justice. The decision I have given is one which will I hope reconcile the provisions of the Act of 1860 with the existing privileges of the King's Prerogative. I cannot think that the Act of 1860 left the Court in a state of incurable paralysis with respect to the amendment of petitions of right.

I turn now to the merits of the claim. In spite of the lengthy hearing I shall be able to express my views with comparative brevity. [His Lordship having stated the facts set out above continued :] I state at once my decision, that the Crown committed a breach of contract. They had no power to end the bargain as they did. The contractual period was fixed by the written agreement. It was for the

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"duration of the war." I shall have to briefly deal with the meaning of that phrase hereafter. In June and July, 1918, the war was in full and unparalleled progress. Whatever view be taken of clauses 2 and 5 of the bargain it is plain that the Crown did not act or purport to act under those clauses. Those clauses, moreover, give no power to end the contract, but only confer a discretion as to the capacity of the school and the number of pupils to be allotted. It is equally plain that the Crown did not profess to treat the bargain as repudiated by the plaintiffs by reason of non-performance of their contractual obligations: see, e.g., the minutes of the Air Council dated May 30, 1918. As will appear hereafter, I hold, moreover, that no sufficiently adequate ground existed which would have justified the Crown in charging the plaintiffs with so serious a matter as repudiation. There was nothing here by the suppliants which amounted to "a renunciation, to an absolute refusal to perform the contract": see per Lord Selborne L.C. in *In re Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) In my judgment in *Rubel Bronze and Metal Co. and Vos* (2) I ventured to state the effect of the leading decisions on the question of repudiation. I may add that down to the very end of June, 1918, the Crown increased the number of pupils sent to the school, and that they paid full fees down to that date. I therefore hold that the suppliants are entitled to damages for breach of contract. What is the amount of those damages? The evidence which bears on the matter (either directly or indirectly) has been prolonged and detailed. The arguments on the point have been most full and able. I feel bound to say at once that in my opinion the claim of the suppliants has been grossly exaggerated from the time it was first put forward in 1918. Clause 6 of the Petition (which was presented in May, 1920) is this: "By reason of the matters aforesaid your suppliants have been deprived of the benefit of the said contract since the 1st of July, 1918, and have lost the profits which they would have earned under the said contract being at the rate of 40,000*l.* per annum for the duration of the war." This statement is without justification.

(1) (1884) 9 App. Cas. 434, 439. (2) [1918] 1 K. B. 315, 322.

Still more serious, however, was the inflation of the claim put forward on September 6, 1918, when they demanded compensation from the Government on the footing of a profit at the rate of no less than 80,000*l.* per annum. I shall not narrate the many and extremely unsatisfactory features of the company's profit and loss accounts and balance sheets, or the unfortunate character of some of the correspondence in which they put forward their varying claims It will suffice to say that the Attorney-General and Mr Giveen were, I think, amply justified in their pungent and condemnatory criticism. At the trial before me Mr. Upjohn K.C and Mr Craig Henderson, with their customary sagacity, placed the claim on a more reasonable basis and presented a formulation in juster accord with legal principles, actual circumstances, and with possible findings of fact. I shall deal as broadly as possible with this question of damages. I have weighed every fact and document and considered every argument. It is reasonably clear, I think, that the plaintiffs' demand for damages falls under two main heads—namely, (1.) Loss of profit from pupils. (2.) General damages for breach. I shall deal with these separately and concisely.

There is, however, one preliminary question which calls for decision. It is this. What period am I to take as the duration of the contract ? This may perhaps be a question of general importance. Clause 2 of the main agreement says that the contract is to be "for the duration of the war." It is agreed that there is no decision which throws light on the meaning of these words in such a contract as this. It is necessary to set out s. 1, sub-s. 1, of The Termination of the Present War (Definition) Act, 1918, passed November 21, 1918 (8 & 9 Geo. 5, c. 59). It is this : "His Majesty in Council may declare what date is to be treated as the date of the termination of the present war, and the present war shall be treated as having continued to, and as having ended on that date for the purposes of any provision in any Act of Parliament, Order in Council, or Proclamation, and, except where the context otherwise requires, of any provision in any contract, deed, or other instrument referring, expressly

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or impliedly, and in whatever form of words, to the present war or the present hostilities." Sub-s. 3 further provides that "His Majesty in Council may also similarly declare what date is to be treated as the date of the termination of war between His Majesty and any particular State." I also state the following agreed dates: November 11, 1918, Armistice granted for thirty-six days. December 14, 1918, Armistice renewed. January 18, 1919, the opening of the Peace Conference. June 28, 1919, the signature of the Peace Treaty. January 10, 1920, the ratification of the Peace Treaty. August 31, 1921, the official termination of the war. These dates present a wide range of arguments. Counsel on both sides realized fully their respective difficulties. Prima facie the war lasted till August, 1921. This is the effect of the Act of 1918 and the Order in Council of August 10, 1921 (Gazetted August 12, 1921). "War" seems to me to be a word of varying meanings. The text-books and decisions aid but little. They range from early times till the present day. Mr. Upjohn referred me to the view of Grotius. That most learned author in his De Jure Belli ac Pacis says (see Lib. 3, cap. XXI., para. 2 (p. 365 of vol. iii. of Dr. Whewell's 1853 edition)): "Sic ergo, ut et Gellius dixit, non pax est induciæ: bellum enim manet, pugna cessat. Et in panegyrico Latini Pacati legimus: induciæ bella suspendebant." The question of termination of war is discussed in various treatises—e.g., Hall's International Law, 6th ed., Part III., c. 9, and Oppenheim's International Law, 2nd ed., Vol. II., Part II., c. 7. They do not help me on this point. Here the question is complicated by the number and inter-connection of warring nations. Peace with Turkey is not yet made even to-day. The War Definition Act, 1918, says: "Except where the context otherwise requires." What is meant by the context? I do not think that it means the immediate context to the words "duration of the war" in the contract in question. I give a broader meaning to the word "context." I respectfully adopt the view expressed by the Court of Appeal in *In re Evans* (1), as to the meaning which may be conveyed by the

(1) [1891] 1 Q. B. 143, 145.

word "context." I hold that the word "context" in the Act of 1918 means the context of the whole of the contract. It therefore follows that I must consider the subject matter and the whole provisions of the bargain and its objects as thereby shown. Now, in many respects, this is a business contract, and I recall the words of Lord Halsbury in *Glynn* v. *Margetson & Co.* (1) that "A business sense will be given to business documents." I also recall the words of Mellish L.J. in *The Teutonia.* (2) "A mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties." In my view the parties here cannot have intended, having regard to the nature, object and terms of the contract, that the obligations of the Government should have continued to such a stage as that represented by the official termination of the war in August, 1921. Whilst fully aware of all the difficulties from any point of view, I shall hold that the parties here were contemplating as the "duration of the war" the substantial continuance of active hostilities. I hold that the proper and just date to take is December 14, 1918. At that time the military power of Germany had been broken; with Germany had fallen also the effective power of the countries associated with her. The supremacy of this country and its allies was established. All that remained was the framing of terms on which we should give peace. There had been a substantial cessation of active hostilities. This was the view of the Government of this country. In November, 1918, they ceased recruiting for the Air Forces and the other Forces of the Crown, and the only pupils who received further tuition were those who had reached a very advanced stage of aviatory skill. I think that Mr. Upjohn himself felt that he could not, with useful effect, claim a later date than December 14, 1918. I hold that the period to be regarded as the length of breach is July 1, 1918, to December 14, 1918. This being so, I have to consider what loss of pupils arose during this period in consequence of the

(1) [1893] A. C. 351, 359. (2) (1872) L. R. 4 P. C. 171, 182.

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Government's breach of contract. Now taking the earlier periods as a guide and assuming that the Government had continued to send pupils as theretofore, I estimate that the suppliants would have gotten about 120 pupils. I think that after deducting all costs and expenses necessary for earning the 160*l.* per pupil the suppliants would have gained about 30*l.* profit per pupil. The result is that the maximum claim of the plaintiffs would be 3600*l.*, i.e., 30*l.* gain each on 120 pupils. This I think is the utmost figure to be considered. But at this point a serious question arises—namely, what number of pupils would the Government have sent to the suppliants, even though they had not ended the contract? Now this involves a consideration of the contractual obligations imposed on the Crown by their bargain. The more relevant clauses are Nos. 2 and 5. In my opinion the contract imposed on the Government the duties (*a*) of bona fide considering and deciding from time to time the efficiency and capacity of the suppliants' school, (*b*) of bona fide considering and deciding how many pupils should be sent to the school having regard to the Government's honest opinion of the efficiency and capacity of that school. Having formed bona fide decisions on these matters, it rested with the Government to decide whether the pupils sent should be numerous or few; whether they should be many or none. I am satisfied that the Air Council, at the end of June, 1918, had formed a clear, honest and settled view that the suppliants' school was not one at which training in aviation was efficiently given, and that they had ample warrant for this view. [His Lordship having examined the evidence continued:] I hold that as from July 1, 1918, the Government decision not to send more pupils to the suppliants' school was not only bona fide but was based on good grounds, and I further hold that the decision was and would have been the same whether the contract was rightly and technically determined or not. I cannot therefore award damages to the suppliants for the actual loss of pupils after June 30, 1918.

This leaves only the question of general damages. The suppliants are entitled, at the least, to nominal damages.

But I think that I am entitled to give them more than that for the extremely abrupt determination of the contract by the Crown without any adequate notice. I cannot overlook the fact, as pointed out by Mr. Upjohn in his reply, that the Government actually increased the number of pupils sent to the suppliants' school from January 1, 1918, to June 30, 1918, as compared with earlier periods. True, this increase was not proportionate to the vast increase in other schools. But still it was an increase. In the spring of 1918, moreover, the Government had actually increased the total fee per pupil from 135*l.* to 160*l.* These and other facts do not really affect the amount of general damages, but I may be permitted to say that they illustrate the regrettable isolation of one department from another in the Ministry and the lack of co-operative organization between them.

Upon the question of general damages I may refer to *Hobbs* v. *London and South Western Ry.* (1), to various observations of the House of Lords in *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan* (2), and to the cases cited in Arnold's Treatise on Damages, 2nd ed., p. 13.

I am entitled to award something for the general inconvenience, trouble and expense caused by the Crown's breach of contract in so abrupt a manner. These different heads call for no detailed mention. They will appear upon an analysis of the suppliants' accounts and a consideration of the general circumstances of the case. I fix this sum of general damages at 250*l.*, and I have regard (inter alia) to the fact that the Government by their repudiation deprived the suppliants of any opportunity to remedy inefficiency or incapacity, although the Government themselves were responsible for the inability of the suppliants to obtain better machines than the "Caudron" for training purposes.

The question of costs is serious. No taxing Master can adequately deal with the complex questions or issues of fact and of law and apportion to each an amount appropriate to the evidence and documents and to the time taken by the arguments on the various points. I have considered

(1) (1875) L. R. 10 Q. B. 111. (2) [1905] A. C. 302.

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the matter to the best of my ability. I do not overlook the counterclaim for 1227*l.* 15*s.* 4*d.* This was set up by the Crown in these proceedings by virtue, I assume, of the wording of s. 7 of the Petitions of Right Act, 1860. I may refer to the letters on December 6, 1920, and December 20, 1920. In Halsbury's Laws of England, vol. x., p. 33, it is said: "At common law the Crown never counterclaims." Mr. Upjohn however very fairly raised no technical point against the counterclaim, and he admitted the amount claimed by the Crown.

The costs of the entire matter are in my judicial discretion: see ss. 11 and 12 of the Act of 1860. Upon the whole I think that justice will be done if I direct that the suppliants' costs of the proceedings be taxed and that the Crown do pay one-half of those costs to the suppliants.

Judgment is therefore for the suppliants on the petition for 250*l.* and the above costs, and judgment is for the Crown on the counterclaim for 1227*l.* 15*s.* 4*d.*

Judgment for suppliants.

Solicitors for suppliants: *Joynson-Hicks & Co.*
Solicitor for Crown: *Treasury Solicitor.*

R. F. S.

WYE SHIPPING COMPANY, LIMITED *v.* COMPAGNIE DU CHEMIN DE FER PARIS-ORLEANS.

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Jan. 24, 25.

Shipping—Charterparty—Charterers to re-deliver ship "in same good order as when delivered"—Ship damaged by Charterers' Default—Refusal to accept Tender of re-delivery until repaired—Payment of Hire while Repairs being done—Charterers' Obligations.

A charterparty stipulated that the ship was to be re-delivered at the expiration of the charterparty "in same good order as when delivered." She was damaged owing to the charterers' default, and was tendered for re-delivery in that state. The re-delivery was refused by the owners until the ship was "in same good order as when delivered," and they claimed hire for the period occupied in repairs, at the conclusion of which period they accepted re-delivery:—

Held, that the charterparty involved two obligations on the charterers: (1.) to re-deliver, and (2.) to re-deliver in good order; and that as the ship was tendered for re-delivery at the proper time, no hire was payable in respect of the time subsequent to the tender during which repairs were being executed, but that damages only, for detention and cost of repairs, were payable.

AWARD stated by an arbitrator in the form of a special case.

By a charterparty dated October 20, 1919, made between the Wye Shipping Co., Ld. (herein called "the owners") and the Compagnie du chemin de fer Paris-Orléans (herein called "the charterers"), the charterers chartered the steamship *Wye Crag* for the term of "about twelve months" from a date early in December, 1919. By clause 2 the owners were to "maintain her in a thoroughly efficient state in hull and machinery for and during the service." By clause 5 the charterers were to pay hire from the time when the ship was placed at their disposal "until her re-delivery to owners as herein stipulated . . . . in Cardiff in cash . . . . monthly in advance." In default the owners were given the right to withdraw the steamer from the service of the charterers. By clause 6 the cargo was to be loaded at a wharf or place directed by the charterers "where the steamer can always safely lie afloat." By clause 7, "The steamer shall be re-delivered on the expiration of this charterparty in same good order as when delivered to the charterers (fair wear and tear excepted)."

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After the delivery of the *Wye Crag* she took the ground on various occasions, such grounding being caused by breach by the charterers of clause 6 of the charterparty providing that she was to be loaded where she "can always safely lie afloat," and her bottom was thereby injured. On December 13, 1920, the charterers tendered re-delivery of the *Wye Crag* to the owners, but the latter refused to accept re-delivery pending the dry-docking of the steamer for the examination of her bottom, on the ground that she was not, as stipulated in clause 7, "in same good order as when delivered to the charterers (fair wear and tear excepted)." On December 17 the steamer was put in dry dock and was repaired and painted, and was refloated on December 22 and handed over to the owners on that date.

The owners contended that re-delivery under the charterparty was not made until December 22, and claimed hire under clauses 5 and 7 from December 13, when she was tendered to them, until December 22.

The charterers contended that they had re-delivered the steamer on December 13 and that the owners ought then to have accepted her, and denied that any hire was payable subsequent to that date.

The arbitrator found that there had been re-delivery on December 13, and rejected the claim for hire, but awarded damages in respect of the injuries caused by the breach of clause 6, and in respect of the detention of the steamer during repairs, and embodied his award in this Case.

Raeburn K.C. and *Langton* for the owners. The steamer was not properly tendered for re-delivery on December 13, because she was not then "in same good order as when delivered," inasmuch as she was damaged. The clause is a natural one to insert. The owners say, "We do not want any difficulties about damages. We let you our ship and we want her back in the same condition as when we let her." And until re-delivery—which means proper re-delivery—hire was payable under clauses 5 and 7.

[*Wright K.C.* referred to *Italian State Rys.* v. *Mavrogordatos* (1) and *Limerick Steamship Co.* v. *Stott & Co.* (2)]

In *Italian State Rys.* v. *Mavrogordatos* (1) the decision turned on the fact that the vessel was withdrawn from the charterers' service before the latter had tendered re-delivery, and that distinguishes the case from the present case. And in *Limerick Steamship Co.* v. *Stott & Co.* (2) the claim was for damages, not for hire.

Wright K.C. and *Le Quesne* for the defendants. The award of the arbitrator is correct. The meaning of clause 7 is that the steamer must be re-delivered at the end of the charter period, and, ancillary to that, that she must be re-delivered in the same good order as when delivered, subject to this, that if the damage to the ship was not caused by their default the charterers are not liable for it. Cases between landlord and tenant are analogous to this case. Thus in *Birch* v. *Clifford* (3), where the tenant had, in breach of his covenant, delivered up the house to the landlord in a bad state of repair, it was held that the landlord was entitled to damages for the period during which the house was useless while being put into a state of repair, but was not entitled to rent: see also *Woods* v. *Pope*. (4) The right to hire never runs while the ship is inefficient. The owners, therefore, are entitled to damages and not to hire.

Langton in reply. In landlord and tenant cases the equivalent of clause 5 is absent, and they are of no assistance. [*French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (5) was referred to.]

McCARDIE J. This award involves the determination of a dispute between the owners and charterers of the steamship *Wye Crag* under a time charter in the form known as the Baltic and White Sea Conference Uniform Time Charter, 1912. There are two points involved, relating, first, to the obligation to re-deliver the ship, and, secondly, to the meaning

(1) [1919] 2 K. B. 305.
(2) [1921] 2 K. B. 613.
(3) (1891) 8 Times L. R. 103.
(4) (1835) 6 C. & P. 782.
(5) [1921] 2 A. C. 494.

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of "dunnage." The charterparty was dated October 20, 1919, and by clause 1 the charterers chartered the *Wye Crag* for a term "of about twelve months." By clause 2 the owners were to "maintain [the vessel] in a thoroughly efficient state in hull and machinery for and during the service." By clause 5 the charterers were to pay hire commencing from the time when the vessel was placed at their disposal "until her re-delivery to owners as herein stipulated . . . . in Cardiff in cash . . . . monthly in advance." By clause 6 the cargo was to be loaded at a wharf or place directed by the charterers "where the steamer can always safely lie afloat." By clause 7 "The steamer shall be re-delivered on the expiration of this charterparty in same good order as when delivered to the charterers (fair wear and tear excepted)."

On December 13, 1920, which was about twelve months after being placed at the charterers' disposal, re-delivery of the vessel was tendered to the owners, but the owners refused to accept re-delivery pending dry-docking for the examination of the vessel's bottom, on the ground that she was not "in same good order as when delivered." On December 17 she was placed in dry dock and was found to have sustained some damage through taking the ground. She was repaired and refloated on December 22. The arbitrator has found that the damage was caused by breach of clause 6 of the charterparty in that the charterers had caused the vessel to be loaded in shallow waters where she had taken the ground.

The owners claim that they are entitled to the hire of the vessel from December 13, when they refused the tender of re-delivery, to December 22 when she was re-delivered to them, because they say that on the latter date the vessel was first tendered for re-delivery in "good order" within the meaning of clause 7 of the charterparty. The arbitrator has awarded the shipowners the costs of the repairs and also a substantial sum for damages for loss of the use of the vessel while undergoing repairs. The shipowners say that their legal rights go beyond that and that they are entitled to continuous hire until re-delivery in good order.

The point is an important one, and in my view the contention of the shipowners is not well-founded. I think that the true effect of clauses 5 and 7 is that there are two obligations upon the charterers, firstly and primarily, to re-deliver the vessel at the expiration of the contract period, and, secondly, a subordinate though important obligation, to then re-deliver her in good order. In my opinion they are not liable for hire after they have tendered re-delivery at the proper time. If the rule were otherwise it seems to me that absurd situations would arise. Take the case of a ship entering a port for re-delivery to the owners, she being then in good order, and as she enters she suffers some small damage which cannot be repaired at that port. To my mind it would be impossible to hold that, although the charterer is willing to re-deliver the vessel then and there, he should be liable for the full hire until she is repaired, although in the case I have put she may be able to fulfil her duties perfectly well in spite of the damage sustained. I may further test the position by taking this case. Where the freight market was very high it might pay a charterer to retain the vessel beyond the charter period, and he might say, "I have not only the privilege but the duty to do the repairs," and take advantage of some slight damage to retain her on hire. I think the owners would be much astonished at such a contention. But I doubt whether a charterer has any right to do repairs as opposed to being under an obligation to do them. It is a matter which may well call for consideration. The difficulty in the way of the owners is still further emphasized by classifying damage. It may arise from some peril of the sea apart from the charterers' default, or it may arise from the default of the charterers. In the former case could the owners refuse to accept re-delivery? And in the latter case, where it is conjoint with the former damage, what would be the position? It seems to me that the construction of the charterparty presented by the owners is one that would not work in practice, and the construction which reconciles the totality of the provisions in the charterparty is one which holds that the charterers must re-deliver at the end of the hire period subject

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to their liability to pay for the repairs and to pay damages. I therefore decide this point in favour of the charterers. I only wish to add that on the facts in the present case the observations of the Court in *Italian State Rys.* v. *Mavrogordatos* (1) and of Scrutton L.J. in *Limerick Steamship Co.* v. *Stott & Co.* (2) do not assist me. I desire to add also that although I appreciate the analogy of landlord and tenant cases as illustrated by *Woods* v. *Pope* (3) and *Birch* v. *Clifford* (4), yet I conceive that the question of estate which arises in these cases between the landlord and tenant precludes them from being usefully cited here.

[His Lordship then considered the question whether certain shifting boards were or were not dunnage within the charter-party which he held to be a question of fact.]

The award, therefore, must be upheld.

Award upheld.

Solicitors for plaintiffs : *Downing, Middleton & Lewis, for Downing & Handcock, Cardiff.*

Solicitors for defendants : *Botterell & Roche, for Vaughan & Roche, Cardiff.*

(1) [1919] 2 K. B. 305.
(2) [1921] 2 K. B. 613, 621.
(3) 6 C. & P. 782.
(4) 8 Times L. R. 103.

W. L. L. B.

FOX (APPELLANT) *v.* BURGESS (RESPONDENT).

1922 Jan. 25.

Education—Public Elementary School—Medical Examination—Refusal to submit—Rights of Education Authority—Duties of Parents and Children—Non-attendance—Reasonable Excuse—Elementary Education Act, 1876 (39 & 40 *Vict. c.* 79), *ss.* 11, 12—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 122.

The Children Act, 1908, s. 122, empowers a local education authority to direct their medical officer to examine in any public elementary school the person and clothing of any child attending the school, with a view to the cleansing of verminous children. The appellant's daughter, aged twelve years, ordinarily attended a public elementary school in the borough of Hove. On three successive occasions, acting under the instructions or guidance of the appellant, she refused to submit to the medical examination directed by the local education authority in accordance with the above section. She was accordingly reported to the education authority and they excluded her from the school for persistent insubordination, informing the appellant of their resolution. The appellant subsequently sent her to the school, but she was refused admittance. He was then charged with having unlawfully and without reasonable cause failed to comply with an attendance order previously made by the borough justices and was convicted by them :—

Held, that the appellant had not taken reasonable steps to comply with the order and was rightly convicted.

The Children Act, 1908, s. 122, imports an obligation upon the child to submit to the examination therein directed, and if a child, acting under the instructions or guidance of its father, refuses to submit, the father becomes responsible for the refusal.

CASE stated by the justices for the borough of Hove.

A complaint was preferred against the appellant by the respondent on behalf of the education authority for the borough of Hove for that he, being the parent of Violet Fox, a child of the age of twelve years, had unlawfully and without reasonable excuse failed to comply with an order made by the borough justices on April 18, 1921, directing that the child should attend the Portland Road School in the borough. The complaint was heard on October 31, 1921, when the appellant was convicted and fined.

The following facts were proved or admitted before the justices :—

On June 13, 1921, the school medical officer acting on the instructions of the local education authority, visited the Portland Road School with the object of examining the

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clothing and person of Violet Fox in accordance with the Children Act, 1908, s. 122, she having previously refused to be examined at the general medical inspection of scholars. The child refused to submit and the examination accordingly was not carried out. On September 5, 1921, the school medical officer again attended with the same object; the child again refused to submit to examination, and on the medical officer placing his hand upon her shoulder she moved away. This was accepted as an intimation that a physical refusal would ensue if the examination were persisted in, and the child was informed that she would be reported for persistent insubordination.

The matter was reported to the education committee and at their meeting on September 14, 1921, the committee decided to exclude the child from the school on the ground of persistent insubordination, consisting of her refusal to submit to the examination. Notice of this decision was sent to the appellant, but was returned, marked "refused." The appellant declined to allow his child to be medically examined under the section. Since September 14, 1921, the child had been sent to school, but had been refused admittance.

The appellant contended: (1.) that the exclusion of the child by the education authority was a reasonable excuse for non-attendance; (2.) that the education authority were indirectly seeking to enforce obedience to an Act of Parliament which itself created no offence or penalty for disobedience; and (3.) that there was no obligation on a parent to submit his child to examination under the Children Act, 1908, s. 122. (1)

(1) Children Act, 1908 (8 Edw. 7, c. 67), s. 122: "A local education authority may direct their medical officer, or any person provided with, and, if required, exhibiting the authority in writing of their medical officer, to examine in any public elementary school provided or maintained by the authority the person and clothing of any child attending the school, and, if on examination the medical officer, or any such authorised person as aforesaid, is of opinion that the person or clothing of any such child is infested with vermin or is in a foul or filthy condition, the local education authority may give notice in writing to the parent or guardian . . . . requiring him to cleanse properly the person and clothing of the child within twenty-four hours after the receipt of the notice."

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For the respondent it was contended: (1.) that the education authority were justified in insisting upon the examination under s. 122, such examinations being for the mutual benefit and protection of children attending the school, and that the child's refusal was insubordination justifying the making of the order for exclusion; (2.) that there was an implied obligation on a parent to submit his child to the examination contemplated in s. 122; (3.) that the exclusion was not a reasonable excuse for not complying with the order.

The following cases were cited: *Walker* v. *Cummings* (1); *Jones* v. *Rowland* (2); *Saunders* v. *Richardson*. (3)

The justices, as already stated, convicted the appellant. They held upon the authority of *Saunders* v. *Richardson* (3) that to "attend" meant to attend under such circumstances that the child would receive the benefit of the instruction offered, and that there had been no compliance by the appellant with the attendance order within this definition. They further held that the appellant had no reasonable excuse for not complying with the order and that although the Children Act, 1908, did not specifically make it an offence to refuse to submit to the examination referred to in s. 122, it was within the powers of the local education authority to insist upon it.

Wedderburn for the appellant. The legislation did not intend that the examination under s. 122 of the Children Act, 1908, should be compulsory, and certainly no such intention is expressed in that section. The section provides that the authorities shall make provision for the examination to be conducted, but it does not say that a parent must submit his child for examination. A similar provision for medical examination is made in the Education (Administrative Provisions) Act, 1907, s. 13, and as to that the Local Education Authorities (Medical Treatment) Act, 1909, s. 3, expressly enacts that "nothing in this Act shall be construed as imposing

(1) (1912) 107 L. T. 304. (2) (1899) 80 L. T. 630.
(3) (1881) 7 Q. B. D. 388.

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any obligation on a parent to submit his child to medical inspection or treatment under s. 13 of the Education (Administrative Provisions) Act, 1907." This shows that in the absence of express direction, no obligation is intended to be imposed upon a parent.

If it is held that there is such an obligation, then the proper course for the education authority was not to expel the child but to exercise discipline over it.

[ROCHE J. A compulsory inspection might be harmful to a nervous child.]

There might be difficulty in individual cases, but the principle still stands. It is certainly inconsistent to expel a child for persistent insubordination, before disciplinary methods have been applied. In *Gateshead Union* v. *Durham County Council* (1) Scrutton L.J. says in his judgment (after alluding to the right to free education conferred upon parents by the Education Acts): "I am of opinion that the parent has an equal right to restrain, by the order of the Court, an attempt to impose a condition on the admission of his child for which there is no statutory authority and which is inconsistent with his statutory right to free education."

The burden is upon the respondent to prove that the educational authority is empowered by statute to require this medical examination as a condition of attendance at the school, and this burden has not been discharged. The course here pursued by the educational authority—namely, to expel the child, and then to prosecute the parent for non-attendance—is a dangerous one and should not be encouraged.

Finally, s. 122 of the Children Act, 1908, is a penal section, and inasmuch as it is certainly doubtful whether the examination is obligatory, this conviction ought not to stand.

du Parcq for the respondent. (1.) The attendance order here was lawful; (2.) the refusal by the appellant to submit his child for examination entitled the authority to exclude the child; and (3.) the appellant has failed to make the attendance effective. It follows from *Saunders* v. *Richardson* (2) that he is liable to conviction under the Elementary

(1) [1918] 1 Ch. 146, 167. (2) 7 Q. B. D. 388.

Education Act, 1876, s. 12, for non-compliance with the order. "Attendance" is not satisfied by an abortive attempt to attend: *Jones* v. *Rowland* (1); *Walker* v. *Cummings* (2); *Bunt* v. *Kent*. (3)

The Education (Administrative Provisions) Act, 1907, s. 13, provides for a medical examination relating to the general health and condition of the child. This is optional so far as the parent is concerned and he may be required to pay for it. No charge can be made for the examination under the Children Act, 1908, s. 122; it is a sanitary rather than a medical examination and is as much for the benefit of the other children as for the benefit of the particular child. That section is not touched by the Local Education Authorities (Medical Treatment) Act, 1909, s. 3.

Wedderburn in reply. The cases cited for the appellant only go to show that in certain circumstances the educational authority may exclude the child and hold the father responsible for its non-attendance. They cannot govern the present case.

Avory J. The appellant in this case was summoned under the Elementary Education Act, 1876, and the substance of the charge against him is that he did not cause his daughter, who was aged twelve years, to attend school. It has been held in numerous cases, which have been cited to us, that a parent who sends his child to a particular school, knowing that in the circumstances the child will be refused admittance to that school, is not causing that child to attend school, and has no reasonable excuse for the child's non-attendance.

The question here is whether the parent knew that in the circumstances the child would be refused admittance and whether he had any reasonable excuse for the child's non-attendance. It is quite clear from the justices' findings of fact that he knew that the child would be refused admittance, because she had been reported for "persistent insubordination" and excluded from the school upon that ground.

(1) 80 L. T. 630. (2) 107 L. T. 304.
(3) [1914] 1 K. B. 207.

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The remaining question is whether the child had been properly excluded from the school on this ground. If not, then it cannot be said that the parent was guilty of not causing the child to attend when he sent her there. The insubordination for which she was reported was her refusal to allow herself to be examined by the medical officer under the Children's Act, 1908, s. 122. One of the facts found in this case is that the medical officer, acting under the instructions of the education authority, visited this school on June 13, 1921, for the purpose of examining this child under the provisions of s. 122, and that the child then refused to submit to the examination; again on September 5, 1921, when the medical officer attended in accordance with his instructions for the same purpose, the child refused to submit to examination, and upon the medical officer placing his hand on her shoulder for the purpose merely of exercising his authority, or as an indication that he was claiming authority to examine her, the child moved away, showing thereby the intention not to allow herself to be examined. The justices found that that was done under the guidance, if not by the actual instructions of the appellant, and that he declined to allow his child to be examined in accordance with s. 122 of the Children's Act, 1908.

It is argued by Mr. Wedderburn that although s. 122 authorizes the local education authority to direct their medical officer to make an examination in order to discover whether the child is verminous or in a dirty condition, that does not import or involve any obligation upon the child to submit to such an examination, nor upon the parent to allow the examination of the child under the section. He suggests that the only remedy, if a child refuses to submit or is instructed by its parent not to submit, is for the school authorities to exercise their disciplinary powers upon the child so as to compel it to do so. Now in my opinion that would put upon the school authorities a responsibility which was never intended by this Act of Parliament. It might lead to scenes of disorder in the school, which are subversive of discipline, and to summonses in the police courts which

are all too frequent when ordinary corrective discipline is applied in elementary schools. In my opinion s. 122, which empowers the medical officer to examine for this purpose, does import an obligation upon the child to submit to that examination, and if a child under the instructions or guidance of its father refuse to submit, the father becomes responsible for the refusal. The child becomes insubordinate, for which insubordination the father is himself responsible.

If the child is excluded from the school in consequence of that insubordination and the father knows that it is so excluded, then I think he fails to cause the child to attend the school within the meaning of the Elementary Education Act, 1876. For he has not taken steps to put the child into a proper condition to be received into the school, and the only way in which he can do this is by removing his objection and that of the child to the examination by the medical officer. Until he does so, he is himself preventing the proper attendance of the child at school, in other words, he is not causing it to attend within the meaning of the statute.

The Local Education Authorities (Medical Treatment) Act, 1909, has been very properly relied on by Mr. Wedderburn on behalf of the appellant. That statute, which was passed after the Children's Act, 1908, provides in s. 1: "Where any local education authority provides for the medical treatment of children attending any public elementary school under s. 13 of the Education (Administrative Provisions) Act, 1907, there shall be charged to the parent of every child in respect of any treatment provided for that child such an amount not exceeding the cost of treatment as may be determined by the local education authority, and in the event of payment not being made by the parent it shall be the duty of the authority, unless they are satisfied that the parent is unable by reason of circumstances other than his own default to pay the amount, to require the payment of that amount from that parent, and any such amount may be recovered summarily as a civil debt." That section is not intended to apply to any

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such examination or treatment of children as concerns us in the present case, but only to their general medical treatment for illness, disease or infirmities, as distinguished from dirty or verminous condition. The Education (Administrative Provisions) Act, 1907, provides that the powers and duties of the local education authorities shall include the duty to provide for the medical inspection of children immediately before or at the time of or as soon as possible after their admission to a public elementary school, and on such other occasions as the Board of Education shall direct, and the power to make such arrangements as may be sanctioned by the Board of Education for attending to the health and physical condition of the children educated in public elementary schools. That refers, as I have said, to the general medical treatment of children, as distinct from the particular inspection provided for under the Children's Act, 1908, s. 122, which relates only to a dirty or verminous condition. Then the Act of 1909, s. 3, provides: "Nothing in this Act shall be construed as imposing any obligation on a parent to submit his child to medical inspection or treatment under s. 13 of the Education (Administrative Provisions) Act, 1907." In one sense it might be said, applying the well-known doctrine "Expressio unius est exclusio alterius," that the very fact of excluding the liability of the parent under s. 13 of the Education (Administrative Provisions) Act, 1907, by implication includes a liability on the parent under the Children's Act, 1908. But apart from this I think that s. 3 of the Act of 1909 is intended to be limited strictly to cases where the medical inspection takes place under the Act of 1907, and where it is for the purpose of looking after the general health of the children as distinct from the verminous or dirty condition for which provision is made under the Children's Act, 1908.

I therefore come to the conclusion that s. 3 of the Act of 1909 affords no answer to the respondent in this case. It might be sufficient to say that I concur in the judgment of the justices and their reasons, which are expressed very clearly as recorded in the special case. There is nothing

there from which I dissent, and for the reasons I have given, I agree that the judgment was right and that the appeal ought to be dismissed.

SALTER J. I am of the same opinion. I think that the Children's Act, 1908, s. 122, imposes by a necessary inference both upon children and upon parents a duty to submit to the sanitary examination which is there authorized, a duty on the part of the children to submit and on the part of the parents to co-operate. This child had repeatedly and persistently refused to obey the lawful instructions of those in authority. It is unnecessary to consider whether the child's teacher or the medical officer or representative would have been justified in law in overcoming the child's resistance by force; nor is it necessary now to consider whether or not the medical inspection and treatment which is provided by education authorities in pursuance of the duty imposed upon them by the Education (Administrative Provisions) Act, 1907, s. 13, is obligatory either upon children or their parents. The material facts seem to me to be that this child had persistently refused to obey a lawful order, with the result that she was a possible danger to the other scholars, that her conduct was with the knowledge and approval and support of the appellant, her father, and that by the proper exercise of his parental authority and control he could have induced her to obey the order given to her. If so, the effect is that, while it is true that the appellant sent the child to the school gates, he sent her there instructed to disobey and to persist in disobedience to a lawful order. The question is whether in the circumstances the charge is made out that he had "failed to comply with the order unlawfully and without reasonable excuse," and in my opinion it is made out. I do not propose to review the authorities which have been cited to us, but they appear to me to show that the law requires of the parents of children who attend public elementary schools a reasonable co-operation. In *Saunders* v. *Richardson* (1) Lord Coleridge C.J. said, after dealing with the facts: "Unless

(1) 7 Q. B. D. 388, 392.

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he"—the father—"has taken these steps" (i.e., used reasonable efforts to comply with the order) "I cannot think that he has made the reasonable efforts to fulfil his duties which the Act requires." To send a child to school without the fee, where fees are payable; to send a child to the wrong school; to send a child to school, who is known to be verminous: in each of these cases, this has been held not to be a complete and efficient performance of the duty of the parents. I think that this case falls within those classes and that the appellant was rightly convicted.

Roche J. I agree and I have nothing to add.

Appeal dismissed.

Solicitors for the appellant: *Venn & Woodcock, for H. E. Trangmar, Hove.*

Solicitors for the respondent: *Sharpe, Pritchard & Co., for W. J. Harrison, Hove.*

F. P. F.

C. A.

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Feb. 1.

[IN THE COURT OF APPEAL.]

BLAY *v.* DADSWELL.

[1920. B. 4952.]

Agricultural Holding—Notice to quit—Sale of Part of Holding—Invalidation of Notice—Agricultural Land Sales (Restriction on Notices to Quit) Act, 1919 (9 & 10 Geo. 5, c. 63), s. 1.

By s. 1 of the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, "On the making, after the passing of this Act, of any contract for sale of a holding, or any part of a holding held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the holding given to the tenant, either before or after the passing of this Act, shall be null and void, unless the tenant shall, after the passing of this Act and prior to such contract of sale, by writing, agree that such notice shall be valid":—

Held, that the section applies not only to contracts of sale of holdings to third persons, but also to contracts of sale to the tenants themselves. Sect. 29 and Sch. I. of the Agriculture Act, 1920, are amending and not merely declaratory, and are not retrospective as to notices which would, if valid, have expired before the commencement of that Act.

APPEAL from a judgment of Rowlatt J.

In the year 1912 Messrs. Herbert and Alan Richardson, being owners of the Hilders Court Estate in Sussex, let a portion of that estate, consisting of two small farms known as Chiswell and Honeywick, and a field No. 325 in the Ordnance Survey plan, to the defendant as tenant from year to year from Michaelmas, 1912, subject to twelve months' notice to quit on either side. The three above-mentioned parcels were let by the same tenancy agreement as one holding. On May 21, 1919, Messrs. Richardson agreed to sell the whole of the said holding to the plaintiff, and on May 31, 1919, at the plaintiff's request they gave the defendant notice to quit at Michaelmas, 1920. On August 19, 1919, the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, was passed. (1) On March 10, 1920, the plaintiff agreed to resell to the defendant the Chiswell Farm portion of his holding. On the expiry of the notice to quit at Michaelmas, 1920, the defendant refused to give up possession of field No. 325 upon the ground that in consequence of the sale to him of Chiswell Farm the notice to quit had become null and void under the provisions of the above-mentioned Act. The plaintiff brought this action for recovery of possession of the field. At the trial at Lewes Assizes Rowlatt J. held that, notwithstanding the wide language of the Act, it did not apply to a sale to the tenant, but only to a sale to a third person. The defendant appealed.

C. M. Pitman for the appellant. The case of a sale to the tenant was just as much within the mischief that the Act was designed to meet as a sale to a third person, for if the landlord sold to the tenant a portion of his holding he might be in a position to extort from the tenant an exorbitant price for the remainder. But in any case it is not so clear that the sale to the tenant is outside the contemplated mischief as to justify the Court in departing from the plain meaning of the language used. In *St. John, Hampstead* v. *Cotton* (2), where the House of Lords were invited without success to

(1) See headnote.

(2) (1886) 12 App. Cas. 1, 6, 7.

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extend the natural meaning of a section, Lord Halsbury said: "Doubtless there are cases in which when in the instrument itself, whether a will or a contract or a statute, evidences may be discovered of the general intention of the framer and of the general meaning, or what has been called the governing sense, in which the words or the provisions are to be understood, you may occasionally modify the language which you have to construe with reference to that general intention which has been so ascertained." And Lord Watson said: "In order to justify a departure from the primary meaning of the words of the Legislature, it must be shewn either that the ordinary and grammatical construction of the words would lead to some absurdity, such as the Legislature could never have contemplated, or that it would be plainly contrary to the general scheme disclosed in the context of the statute." Here Rowlatt J. relied on the title to the Act, which is "An Act to amend the law as to Notices to Quit given to Tenants by Owners of Agricultural Land prior to the sale of such land," as indicating that it could not have been intended to apply to sales to tenants. But it is only when the enacting part is ambiguous that the title may be taken into consideration, and here there is no ambiguity. But even if the title could be considered it does not warrant the construction that the judge put upon it. In *Robinson* v. *Nesbit* (1) a landlord in March, 1919, gave his tenant notice to quit in April, 1920. In May, 1919, before the passing of the Act, he sold part of the holding to B., who in September, 1919, after the passing of the Act, resold to S. On those facts it was contended before Russell J. that the resale to S. was, like the sale to the defendant in the present case, not within the mischief aimed at by the Act, but the judge held that as the facts fell within the plain words of the section the notice to quit was void. To meet that decision an amendment was introduced by s. 29 and Sch. I. of the Agriculture Act, 1920 (10 & 11 Geo. 5, c. 76), which provided in s. 1 of the Act, 1919, "After the word 'shall' where it first occurs, insert 'if the contract for sale is made by the person by whom the

(1) [1920] W. N. 57.

notice to quit was given.' " It will be said that the effect of that amendment is to take the present case out of the operation of the earlier Act. But here the defendant had acquired before the passing of the Act of 1920 a right to have the notice to quit treated as void, and that right is preserved by s. 38 of the Interpretation Act, 1889, which provides that where one Act repeals an earlier Act " the repeal shall not . . . . affect any right . . . . acquired . . . . under any enactment so repealed." It is true that that section only applies to a case of " repeal," but every enactment which cuts down the wider signification of language used in the earlier Act is a repeal pro tanto. Therefore the Interpretation Act applies, and the defendant's right remains unaffected.

Morle (*J. B. Matthews K.C.* with him) for the respondent. The Agriculture Act, 1920, is declaratory of the meaning of s. 1 of the Act of 1919, notwithstanding that the provision of the later Act is spoken of in s. 29 and in the heading to the schedule as an " amendment." It in substance states that the interpretation put upon the earlier Act in *Robinson* v. *Nesbit* (1) was wrong. It does not alter the meaning of the words used in s. 1, it says that they never meant what Russell J. supposed. Then if the later Act is declaratory of the meaning of the earlier it is retrospective. In *Attorney-General* v. *Theobald* (2) where one revenue Act enacted that an earlier revenue Act " is hereby amended as follows : the description of property marked (C) shall be construed as if the expression ' voluntary settlement ' included any trust . . . . in favour of a volunteer," it was held that notwithstanding the provision was spoken of as an amendment it was retrospective and applied to a case where the property had passed to the beneficiaries before the second Act came into force. So too in *In re Lovell and Collard's Contract* (3) a declaration in a Finance Act as to what the definition of " conveyance on sale " in an earlier Act included was held to be retrospective. If here the Act of 1920 is retrospective and

(1) [1920] W. N. 57. (2) (1890) 24 Q. B. D. 557.
(3) [1907] 1 Ch. 249.

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the words in the Schedule are to be read into the Act of 1919 the condition upon which alone the notice to quit was to be avoided did not exist, for the contract of sale was not made by the person by whom the notice to quit was given. Secondly, upon the construction of the Act of 1919 taken by itself the decision appealed from was right. The Court is not bound to give literal effect to the words of the section if the object with which it was passed suggests otherwise. It is necessary to consider what was the mischief or defect which the Act was intended to remedy. That mischief arose out of the abnormally high prices which land with vacant possession was fetching at the time the legislation was proposed, and the consequent temptation to landlords to dispossess their tenants by notice to quit in order to avail themselves of those prices. The object of the Act was to prevent the landlord selling with vacant possession. A sale to the tenant himself was not within that mischief. The words of the section ought to be read as if they ran "any contract for sale of a holding to a person other than the tenant."

BANKES L.J. This appeal raises the short point whether or not the learned judge put a correct construction upon the Act of 1919, which was passed to amend the law as to notices to quit given to tenants of agricultural land prior to its sale by the owners. The facts are not in dispute. In October, 1912, Messrs. Richardson, who were the owners of a certain agricultural holding, let it to the defendant on a yearly tenancy. On May 21, 1919, they contracted to sell the holding to the plaintiff, and on May 31, 1919, they gave the defendant notice to quit at Michaelmas, 1920. On August 19, 1919, the statute to which I have referred was passed. On March 10, 1920, whilst the notice to quit was current and unexpired the plaintiff entered into a contract with the defendant to sell to him a portion of his holding. The defendant now says that the effect of that contract to sell him a part of his holding rendered the notice to quit void with reference to the whole of the holding, because the case is one which falls exactly within the language of the statute.

What the statute says is this. [He read s. 1.] Here the defendant was "tenant from year to year." There was a contract for the sale of a part of his holding. That contract was made after the passing of the Act and while the notice to quit was current and unexpired. Rowlatt J. held that that section did not apply, being of opinion that the contract of sale there referred to did not include a contract of sale to the tenant. His attention however was not directed to the decision of Russell J. in *Robinson* v. *Nesbit* (1) to which we have been referred, nor was his attention called to the Amending Act of 1920. No doubt the decision in that case does not directly cover this point, but the arguments there addressed to the judge for the purpose of showing that the case was not within the mischief aimed at by the Act were so similar to the arguments addressed to Rowlatt J. that I venture to think that if that decision had been brought to the notice of Rowlatt J. he might have taken a different view. I also think that if his attention had been directed to the amendment in the Act of 1920 he might have been led to think it wrong to depart from the literal meaning of the words used in the earlier Act, having regard to the fact that the Legislature had in a subsequent statute provided by way of amendment for a case like the present, and had in other respects left the earlier Act untouched. This is a case in which in my opinion there is no sufficient indication of the particular mischief which the Act of 1919 was intended to remedy. There is nothing either in the title or in the enacting part to show that the words of the statute should be interpreted in other than their natural sense. Moreover it may be that the Legislature thought that such a case as the present was one which might involve an injustice or grievance that ought to be remedied by statutory provision. Under these circumstances I think the Court ought to give the section its literal meaning, and, it not being disputed that if the language is used in its literal sense it covers this case, I think the appeal must be allowed. With reference to the contention that the

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Agriculture Act, 1920, has a retrospective effect I may say that I think that contention would be correct if limited in its application to a notice to quit which was current at the time when that Act was passed; but I do not think it is possible to give it a retrospective effect so as to make it apply to a notice which, even apart from its avoidance, would have expired before January 1, 1921, when that Act came into operation.

SCRUTTON L.J. On consideration I have come to the same conclusion and think this appeal should be allowed. In 1919 Parliament passed an Act in very wide terms providing that "on the making, after the passing of this Act, of any contract for sale of a holding, or any part of a holding held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the holding given to the tenant, either before or after the passing of this Act, shall be null and void" unless the tenant agrees in writing to the contrary. The Act is as wide as possible; it says "any contract," without restriction. No doubt if you know what the particular mischief is that an Act is intended to remedy you may limit the meaning of general words; for words intended to meet a particular mischief ought not to be given a wider effect. For instance an Act imposing a penalty on the holder of a liquor licence who permits drunkenness on his premises has been held not to apply where the person found drunk on the licensed premises was the licence holder himself, as his intoxication was not within the mischief with which the Act was dealing. (1) If then I could find out from this Act of 1919 what was the mischief with which Parliament was dealing it might be possible to cut down the meaning of the words "any contract." But I cannot find in the Act any indication whatever of the mischief intended to be remedied, and under those circumstances I do not feel justified in cutting down the effect of the language that Parliament has used. Mr. Morle suggests that I ought to read the words

(1) *Warden* v. *Tye* (1877) 2 C. P. D. 74.

"any contract for sale of a holding" as if they were "any contract for sale to a person other than the tenant." It appears to me that if I did that I should be legislating and not interpreting the words that Parliament has used. I confess I strongly suspect that Parliament when using those words went farther than it intended, because I find that in the following year it found it necessary to alter the language and confine the avoidance of the notice to a case in which the sale was by the person who gave notice to quit; but that does not affect the question of the application of the Act to a sale to the tenant. Looking therefore at the Act of 1919 by itself I see no ground for limiting the meaning of the wide language used. The only remaining question is whether the Act of 1920 which amended the Act of 1919 had such a retrospective operation as to reinstate notices to quit which had not only been rendered invalid under the earlier Act, but which would apart from such invalidation have expired by effluxion of time. I think the language of the later Act is not sufficiently strong to have that effect. For these reasons I think the appeal must be allowed.

ATKIN L.J. I agree. I see no reason for cutting down the plain meaning of the words in this section, and I am by no means satisfied that the Legislature cannot have had this very question of a sale to a tenant in its mind. But however that may be I think we are bound to give the words their ordinary and plain meaning, and that the construction put upon them by Russell J. in *Robinson* v. *Nesbit* (1) was perfectly correct. On the question of the effect of s. 29 and Sch. I. of the Agriculture Act, 1920, I think that they are amending provisions, and not declaratory of the construction of the Act of 1919. It appears to me plain that the Act of 1920 has not the effect of reinstating and making good a notice to quit which had already expired before the passing of the Act, and which by the previous Act was declared to be null and void. Whether the Act of 1920 has any retrospective effect at

(1) [1920] W. N. 57.

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all is a question on which I do not desire at present to express any opinion. I agree that the appeal should be allowed and judgment entered for the defendant.

Appeal allowed.

Solicitors for the appellant: *Trinder, Capron & Kekewich, for Blaker & Sons, Lewes.*

Solicitors for the respondent: *Champion & Co.*

J. F. C.

1921 *May* 11.

W. RAMSDEN AND COMPANY, LIMITED *v.* JACOBS.

Arbitration—Hearing—Right of each Party to be present at Hearing of other Party.

In an arbitration between sellers and buyer arising out of the rejection by the latter of certain goods which he alleged did not correspond to the contract description, the arbitrators heard the evidence of each of the parties in the absence of the other. No objection was made at the time to this procedure. An award having been made in favour of the sellers, the buyer moved to set it aside:—

Held, that the award must be set aside, as the arbitrators had acted improperly in hearing the evidence on behalf of one party in the absence of the other.

MOTION to set aside an award.

Ramsden & Co. contracted to sell to Jacobs a quantity of cloth of a certain description. When the cloth was sent to Jacobs he refused to accept delivery, alleging (inter alia) that the cloth did not correspond with the contract description in colour. As the contract contained an arbitration clause, the dispute was referred to arbitration under the rules of the Bradford Chamber of Commerce. The arbitrators obtained written statements from the parties, and having considered them summoned Jacobs to attend before them. He attended and stated his case; the arbitrators then asked him to retire; and they then summoned the sellers and heard their submissions in the absence of the buyer. Later, they issued an award in favour of Ramsden & Co. Jacobs, who made no protest at the time of the arbitration as to

the procedure adopted, now applied to have the award set aside on the ground that he should have been allowed to be present at the hearing of the case for Ramsden & Co. and, if he had thought fit, to cross-examine their witnesses.

Rayner Goddard for Jacobs (buyer). The procedure adopted by the arbitrators violates the elementary principles of justice which require that each party should be heard in the presence, and have the opportunity of cross-examining the witnesses, of the other: *Harvey* v. *Shelton* (1); *Bache* v. *Billingham*. (2) Parties sometimes agree that the arbitration should proceed on written submissions only; but if viva voce evidence is taken, the ordinary rule must be observed.

C. W. Lilley for Ramsden & Co. (sellers). In arbitrations it is common practice where, as here, the dispute is as to quality, for the parties not to appear at all. If the buyer had intimated a desire to cross-examine the sellers' witnesses he would have been allowed to do so. He made no such intimation, and he cannot now rely upon the alleged irregularity: *Matson* v. *Trower* (3); *Hewlett* v. *Laycock*. (4)

Rayner Goddard in reply referred to *In re Enoch and Zaretzky, Bock & Co.* (5)

BRAY J. This is a motion to set aside an award, and the main ground urged before us in support of the motion is that the arbitrators heard evidence of one party in the absence of the other. That procedure was absolutely wrong; I wish to make that quite clear whatever may be the practice. The difficulty I feel is whether the applicant ought now to be heard to complain, having regard to what happened. He made no protest at the time, but that, while a matter to be considered, is not conclusive. It is said on behalf of the sellers that no injustice was done, that the issues were quite plain and depended upon no question of fact on which there would be a conflict of evidence. I feel the force of that, but

(1) (1844) 7 Beav. 455, 462.
(2) [1894] 1 Q. B. 107, 110, 112.
(3) (1824) Ry. & Moo. 17.
(4) (1827) 2 Car. & P. 574.
(5) [1910] 1 K. B. 327.

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Mr. Goddard for the buyer has urged that we ought to show our disapproval of the procedure that was followed, and, with some reluctance, I yield to that argument and say that we ought to set the award aside.

BAILHACHE J. I agree.

Award set aside.

Solicitors for buyer: *Peacock & Goddard.*

Solicitors for sellers: *Blundell, Baker & Co., for Gordon, Hunter & Duncan, Bradford.*

J. S. H.

1921
Oct. 10, 19.

ALEXANDER *v.* WEBBER.

[1920. A. 1147.]

Principal and Agent—Sale—Surreptitious Dealing by Agent of One Principal with other Principal—Promise of Share of Profit to Agent—Avoidance of Contract—Recovery of Deposit.

The plaintiff agreed to purchase a motor-car from the defendant, and in accordance with the agreement he paid a deposit. The plaintiff afterwards purported to repudiate the contract, wrongfully, as the judge found. During the pendency of an action by him for the recovery of the deposit the plaintiff died, and his executors were substituted as plaintiffs, and they then discovered that at the time the contract was entered into the defendant had promised, without the knowledge of the plaintiff, to give the plaintiff's chauffeur a share of the profit on the sale of the car if the plaintiff bought it. On the ground of that secret arrangement the executors now sought to avoid the contract and to recover the deposit:—

Held, that the surreptitious dealing between the defendant and the plaintiff's chauffeur was a fraud on the plaintiff; that the fact that the plaintiff, when he purported to repudiate the contract, was not aware of the fraud, did not prevent his executors from now relying upon it; and that they were entitled on the ground of the fraud to avoid the contract and to recover the deposit.

Observations of James L.J. in *Panama and South Pacific Telegraph Co.* v. *India Rubber, &c., Telegraph Works Co.* (1875) L. R. 10 Ch. 515, 526 applied.

ACTION tried by Bray J.

Alexander, the original plaintiff in the action, claimed to

recover the sum of 250*l.*, which he paid as a deposit under a contract for the purchase by him of a motor-car.

In May, 1920, Alexander was desirous of purchasing a motor-car, and after some negotiation through a coachbuilder named Bath he agreed to buy one from the defendant for 2250*l.*, subject to an examination of it by his chauffeur Knight. He paid a deposit of 250*l.* Later in the same month Alexander repudiated the contract, wrongfully, as the judge found, and, apart from the matter hereinafter mentioned, his action for the return of the deposit would have failed.

During the pendency of the action Alexander died and his executors were substituted as plaintiffs, who then discovered that, at the time when the contract for the purchase of the car was made, the defendant had, without Alexander's knowledge, promised to give Knight, Alexander's chauffeur, a share of the profit on the transaction if Alexander bought the car, which share would amount to over 80*l.* The pleadings were thereupon amended, the plaintiffs claiming that by reason of this surreptitious dealing between the defendant and Knight they were entitled to avoid the contract and to recover the deposit.

J. B. Melville for the plaintiffs. *Panama and South Pacific Telegraph Co.* v. *India Rubber, &c., Telegraph Works Co.* (1) and *Shipway* v. *Broadwood* (2) show clearly that the plaintiffs are entitled to avoid the contract and to recover the deposit.

David White for the defendant. There is a custom in such cases as this for the chauffeur to obtain a commission from the sellers, and it must be taken that Alexander was aware of this.

Cur. adv. vult.

Oct. 19. BRAY J. read his judgment which, after stating the facts, continued: The question I have now to decide is whether Alexander was, or was not, entitled to repudiate the contract by reason of the secret commission which the

(1) L. R. 10 Ch. 515. See the material passage in the judgment of Bray J., post.

(2) [1899] 1 Q. B. 369.

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defendant promised to give to Knight. I find that the promise of this secret commission was made to Knight in order to induce Knight to use all the influence he could over Alexander to buy the car. No doubt it was made before Knight had been designated as the person to make the examination, but the defendant would know that Alexander was likely to be guided by the opinion of his chauffeur; and it was renewed by the defendant when he knew that Knight had to decide whether the car was satisfactory. Knight was thus, by the act of the defendant, put in a position where his interest conflicted with his duty to Alexander. His interest was to say that the car was satisfactory, whether he thought so or not. His duty to Alexander was to give a true and honest opinion.

It was suggested by the defendant that there was a custom to give a commission such as this. I do not believe there is any such custom. If there was, it would not be valid. It is to be observed that the secret commission in this case would amount to over 80*l.*, and all Knight had done was to inform Bath that his master desired to purchase a car. This information he would naturally give in the interest of his master.

As to the law, the principle appears in the judgment of James L.J. in *Panama and South Pacific Telegraph Co.* v. *India Rubber, &c., Telegraph Works Co.* (1), where he said: "According to my view of the law of this Court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him." It is true that the case is distinguishable in some of its facts. In that case the plaintiffs were claiming to rescind the contract on account of the fraud. Here the

(1) L. R. 10 Ch. 515, 526.

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original plaintiff was wholly ignorant of the fraud when he repudiated the contract, and the substituted plaintiffs now seek, having discovered the fraud, to justify the repudiation on account of the fraud. Does that make any difference? Can it be that the defendant gained any advantage by having, for a time, successfully concealed his fraud? I think not. The fraud existed. There has been no laches or acquiescence on the part of the plaintiffs. I think the principle applies and the plaintiffs are entitled to succeed. There must be judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitor for plaintiffs: *H. P. Gisborne.*
Solicitors for defendant: *White & Co.*

J. S. H.

PENFOLD AND ANOTHER *v.* NEWMAN.

1921
Nov. 22.

Emergency Legislation—Landlord and Tenant—Increase of Rent—Notice of Increase—Validity—Mistake—Wrong Percentage—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-ss.* 1 (*c*), 6; *s.* 3, *sub-s.* 2; *First Schedule.*

A notice in writing of a landlord's intention to increase the rent of a dwelling house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, served by him upon the tenant, stating that the increase under s. 2, sub-s. 1 (*c*), is 15 per cent. of the net rent, when in the circumstances it can only be increased under that clause by 5 per cent. of the net rent, is not "a valid notice . . . . in the form contained in the First Schedule to this Act, or in a form substantially to the same effect," within the meaning of s. 3, sub-s. 2, of the Act.

APPEAL from Croydon County Court.

By an agreement in writing dated August 11, 1916, the plaintiffs, the Rev. E. W. D. Penfold and Mr. W. A. Thomson, let to the defendant, Mr. G. R. Newman, a dwelling house, No. 81 South Norwood Hill in the county of Surrey, for the term of three years from September 29, 1916. On the expiration of the term on September 29, 1919, the defendant continued to occupy the premises.

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The plaintiffs served upon the defendant a notice to quit dated June 23, 1920, to expire on September 29, 1920.

In a letter from the plaintiffs to the defendant dated November 18, 1920, and posted on that day, the plaintiffs enclosed a notice of their intention to increase the rent of the house dated November 26, 1920, which followed generally the form in the First Schedule to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (1) That notice omitted clauses (*a*) and (*b*) of the form, and the subsequent portion of the notice was as follows :—

"(*c*) 6*l*. 15*s*. under para. (*c*) of sub-s. 1 of s. 2 of the Act, being 15 per cent. on the net rent of the premises. The net rent is 45*l*. The standard rent is 45*l*.

"(*d*) 11*l*. 5*s*. under para. (*d*) of sub-s. 1 of s. 2 of the Act, being 25 per cent. on the net rent of the premises. The net rent is 45*l*. The standard rent is 45*l*.

"The increase under head (*b*) will date from being one clear week from the date of this notice, and the remaining increases from twenty-fifth day of December, 1920, being four clear weeks from the date of this notice."

The notice of increase in so far as it purported to increase

(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which was passed on July 2, 1920, provides :—

Sect. 2 : "(1) The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall . . . . be as follows, that is to say :— . . . .

"(*c*) In addition to any such amounts as aforesaid, an amount not exceeding fifteen per centum of the net rent : Provided that, except in the case of a dwelling-house to which this Act applies but the enactments repealed by this Act did not apply, the amount of such addition shall not, during a period of one year after the passing of this Act, exceed five per cent. : . . . ."

"(6) Any question arising under sub-section (1), (2) or (3) of this section shall be determined on the application either of the landlord or the tenant by the county court, and the decision of the court shall be final and conclusive."

Sect 3 : "(2) . . . . no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks, or, where such increase is on account of an increase in rates, one clear week, after the landlord has served upon the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect. . . . ."

the rent under s. 2, sub-s. 1 (*c*), of the Act (1) by 15 per cent. of the net rent was incorrect, inasmuch as, the house being one to which the said Act applied, but the enactments thereby repealed did not apply, the amount by which the rent could be increased under that clause was only 5 per cent. of the net rent. The notice was also inaccurate in stating that the net rent and the standard rent of the house were 45*l.*, the rent being in fact 50*l.*; but it was assumed for the purposes of the case that the rent was 45*l.* and that the notice in so stating it was not inaccurate.

The plaintiffs afterwards discovered that the notice of increase was incorrect as regarded the amount of the increase under clause (*c*), and they wrote to the defendant a letter dated December 9, 1920, and received by the defendant on the following day, in which they said: ". . . . we also agree that the increase under clause (*c*) of the notice served on 18th November should be 5 per cent. for the present instead of 15 per cent. . . . ."

The defendant declined to pay the increased rent.

On July 27, 1921, the plaintiffs brought the present action against the defendant in the county court, claiming (inter alia) possession of the premises and two quarters' increase of rent alleged to be due on March 25, 1921, and June 24, 1921, respectively. The defendant gave notice of the special defence that the notice of increase of rent was invalid, and that he relied upon ss. 2 and 3 of the Act.

On September 27, 1921, the action was tried by the deputy county court judge, who held that the notice of increase was invalid, and gave judgment for the defendant.

The plaintiffs appealed.

R. J. Sutcliffe for the plaintiffs. The plaintiffs are entitled to recover the increase of rent which they claim in the action.

The notice of increase of rent was not invalid. The Increase of Rent, &c. (Restrictions), Act, 1920, s. 3, sub-s. 2 (1), no doubt provides that no increase of rent shall be due or recoverable for a specified time after the landlord has served

(1) See note (1) ante, p. 646.

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upon the tenant " a valid notice . . . . in the form contained in the First Schedule to this Act, or in a form substantially to the same effect . . . . ," but that provision does not imply that a notice which is inaccurate in some particular is necessarily invalid. The term " valid " in the sub-section has no special significance, for every statutory notice must be valid, whether expressly required to be so or not. It would appear from sub-ss. 1 and 3 of the same section that the term " valid " is applied to notice in sub-s. 2 merely as meaning that it must be a notice which does not claim an increase in respect of a prohibited period, and which was not served before the Act in respect of an increase under the Act. The sub-section only requires that the notice should be substantially to the same effect as the form in the Schedule. In that form blank spaces are left for the amounts of increase merely for the purpose of informing the person filling up the form where and how these amounts should be filled in, and not as implying that any mistake in the figure filled in will invalidate the notice as a whole. The inaccuracy complained of in this notice is that in clause (*c*) it stated that the increase under s. 2, sub-s. 1 (*c*), was 15 per cent. instead of 5 per cent. of the net rent. That inaccuracy did not, however, render the notice invalid. If the plaintiffs had insisted upon the incorrect amount originally stated in that clause of the notice, the defendant would have disputed it, and a question would thus have arisen to be determined by the county court under s. 2, sub-s. 6, a course clearly implying that in that case the notice would not have been invalid; and, that being so, it cannot consistently be said that in a case like the present, in which the plaintiffs frankly admitted the mistake in the notice and sought to correct it, the notice is for their purposes wholly invalid. If the plaintiffs had actually received from the defendant a sum in excess of the rent legally due, then under s. 14, sub-s. 1, the defendant could only recover back the excess, the payment being valid as to the amount due; and it would seem to follow that where the plaintiffs merely serve a notice upon the defendant claiming a sum in excess of the increased rent to which they are entitled, the notice

should be disregarded only as to the excess, and held valid as to the amount that can be legally demanded. Under the Increase of Rent, &c. (War Restrictions), Act, 1915 (5 & 6 Geo. 5, c. 97), s. 1, sub-s. 1 (vi.), a notice of increase of rent was not invalid because it stated an increase in excess of that which the landlord could legally claim: *Steel* v. *Mahoney* (1), and *Sutton & Sons* v. *Hollerton* (2), and the same principle should be applied to a notice of increase under the present Act. The mistake in the notice of increase was afterwards corrected by the letter of December 9, 1920, from the plaintiffs to the defendant, and the correction related back to the date of the service of the notice. If a notice of increase of rent is rendered invalid by an error in the statement of the amount of increase, great inconvenience will be caused, because in every case in which an error of that kind occurs in the notice a second notice will be required.

A. Hildesley (*E. H. Tindal Atkinson* with him) for the defendant. The plaintiffs are not entitled to recover any increased rent in respect of the dwelling house in question.

The provisions of s. 3, sub-s. 2 (3), of the Act of 1920 are more stringent than the corresponding provisions, s. 1, sub-s. 1 (vi.), of the Increase of Rent, &c. (War Restrictions), Act, 1915, inasmuch as they require that the notice shall be "valid," that it shall be in accordance with a precise statutory form, and that if it is false or misleading in a material respect penal consequences may follow. The term "valid" means correct in substance as well as in form. The statutory form makes provision for the accurate statement of every material fact including the precise amount of increase under each clause, and under clause (*c*) the amount of the increase is made to depend upon the class in which the dwelling house stands for the purposes of the Increase of Rent Acts.

The notice of increase served by the plaintiff upon the defendant was incorrect in a material respect, inasmuch as under clause (*c*) it placed the dwelling house in question in the wrong class and stated that the amount of the increase

(1) [1918] W. N. 253; 34 Times L. R. 327.

(2) [1918] W. N. 237.

(3) See note (1) ante, p. 646.

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under s. 2, sub-s. 1 (*c*), of the Act was 15 per cent. instead of 5 per cent. It was not therefore in the statutory form or in a form substantially to the same effect, and was not "valid" within the meaning of s. 3, sub-s. 2. The notice was not corrected and rendered valid by the subsequent letter of December 9, 1920. The notice could not be corrected and made valid by the county court judge on an application under s. 2, sub-s. 6, of the Act. An application under that sub-section can only be made for the purpose of determining a question between the parties, and not for the purpose of correcting an admitted mistake in the notice. The fact that in clauses (*a*) and (*d*) of s. 2, sub-s. 1, special provision is made for applying to the county court in regard to the amount of the increases under these respective clauses shows that it is not intended that applications should be made to the Court in regard to the amount of the increases under the other clauses of the sub-section. While under the Act of 1915 a notice of increase which was incorrect could be corrected, under the present Act a notice of increase which is incorrect in any material respect is invalid and cannot be corrected: *Peizer* v. *Federman*. (1)

Sutcliffe replied.

SHEARMAN J. This case raises another of the problems under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which the Court is from time to time called upon to solve.

The facts of the case are as follows: [His Lordship stated the facts, reading the material portions of the notice of increase of rent and continued:] The defendant having refused to pay the increased rent, the plaintiffs brought the present action claiming possession of the house and two quarters' increase of rent. The deputy county court judge held that the notice of increase was invalid, and, for the reasons which I am about to state, I am of the same opinion.

The provisions of the Act which it is necessary to consider are s. 2, sub-ss. 1 and 6, and s. 3, sub-s. 2. [His Lordship

(1) [1921] W. N. 320.

read s. 2, sub-ss. 1 and 6, and continued :] As the dwelling house in question is one to which the Act applies, but to which the enactments thereby repealed did not apply, the amount of the increase of rent under s. 2, sub-s. 1 (*c*), could not during a year after the passing of the Act exceed 5 per cent. of the net rent, and the statement in the notice of increase that the increase under that clause was 15 per cent. of the net rent was therefore incorrect. It may be mentioned in this connection that the rent of the house was in fact 50*l*., and that the statement in the notice that it was 45*l*. was also incorrect. The plaintiffs claimed 15 per cent. on 45*l*. instead of 5 per cent. on 50*l*. It is to be assumed, however, for the purposes of the case, that the rent is 45*l*., and I say nothing further as to that. Sect. 3, sub-s. 2, provides that no increase of rent shall be due or recoverable until the expiry of a certain time after the landlord has served upon the tenant "a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect. . . . ." There can be no question that that provision was directly aimed at the protection of tenants. It must no doubt be closely construed both because it infringes the rights of landlords, and also because it goes on to say that in certain contingencies, which have no application to the present case, the landlord may become liable to penal consequences. The provision, however, is meant to give the strongest protection to tenants, and the landlord must comply with it strictly by serving upon the tenant a notice of his intention to increase the rent which is in accordance with the form prescribed by the Act.

The question here is whether or not the notice of increase of rent served by the plaintiffs upon the defendant is a valid notice under the Act, regard being had to the fact that the statement which it contains as to the amount of the increase under clause (*c*) is incorrect. That question presents considerable difficulties. Whichever answer we give to it is open to the suggestion that it seems to lead to absurdity in certain respects.

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It is contended on behalf of the plaintiffs that it would be unreasonable to hold that the notice of increase was invalid because it did not precisely comply with one of the clauses of s. 2, sub-s. 1, in view of the provision which is made by sub-s. 6 of that section for having questions arising under these clauses determined by the county court. It is pointed out, for example, that in order to fix the amount of the increase under clause (*a*) it is necessary first to ascertain the sum expended by the landlord on the improvement or structural alteration of the house, and then to deduct from that any expenditure on decoration or repairs, and that the amount of the increase claimed by the landlord under that clause may well be incorrect and may be disputed by the tenant; and it is urged that it would be absurd to say that the notice of increase was invalid on that ground, inasmuch as sub-s. 6 provides for an application being made to the county court judge to deal with the matter and fix the amount of the increase. The same observation is made regarding the increase of rent in respect of rates under clause (*b*), it being submitted that a mistake might easily be made in estimating the amount of the increase under that head, and that to say that that rendered the notice invalid would lead to an absurdity, seeing that the county court judge has power to determine the question and to decide what the increase should be. Similarly, it is said, a mistake under clause (*c*) like that in the present case should not make the notice invalid, because it could be dealt with and corrected by the county court judge. It has further been contended that, if every mistake in the notice of increase invalidates the notice, great trouble and inconvenience must be caused to landlords by reason of their having to issue second notices. These are the arguments on behalf of the plaintiffs.

On the other hand s. 3, sub-s. 2, of the Act provides that the notice of increase shall be "a valid notice . . . . in the form contained in the First Schedule to this Act, or in a form substantially to the same effect . . . .," and I cannot suppose that the statutory form of notice, which requires that the amount of the increase, and the date of the beginning

of the increase, should be specified, is not intended to be strictly followed. Having regard to the fact that the Act provides a form of notice which requires these particulars to be correctly given, I think that it would lead to an absurdity still greater than that suggested on behalf of the plaintiffs to hold that a notice of increase which did not contain the correct figures was nevertheless a valid notice which could be dealt with and rendered correct by the county court judge under s. 2, sub-s. 6. The Act requires that the notice of increase under clause (*c*) should state correctly the net rent and the standard rent of the premises, and the percentage of the net rent which the landlord claims as increase of rent, and it seems to me that a notice of increase which states under that clause a sum which is not the correct percentage of the net rent is not in accordance with the requirements of the Act. The notice of increase must give the tenant a fair warning of the amount by which the landlord intends to increase the rent, and this notice did not do so.

For these reasons I think that this notice of increase was not a "valid" notice within the meaning of s. 3, sub-s. 2, of the Act.

I do not at present decide whether the same principle applies to clauses (*a*), (*b*), (*d*) and (*e*) of the notice of increase. In this case I only hold that this notice of increase is an invalid notice, because it claims under clause (*c*) an increase of rent which is based upon a substantial inaccuracy.

In my opinion this appeal should fail.

SALTER J. I am of the same opinion. The question is whether the notice which the plaintiffs have given to the defendant of their intention to increase his rent is a valid notice within s. 3, sub-s. 2, of the Act of 1920. The notice declares that it is the intention of the landlords to increase the rent payable by the tenant by a certain amount per annum, and that "The increase is made up as follows: . . . . (*c*) 6*l*. 15*s*. under para. (*c*) of sub-s. 1, of s. 2 of the Act, being 15 per cent. on the net rent of the premises. The net rent is 45*l*. The standard rent is 45*l*. . . . ." As a

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matter of fact the increase which in the circumstances the plaintiffs were entitled to charge under s. 2, sub-s. 1 (*c*), was not 15 per cent. of the net rent but only 5 per cent., and the notice in stating that it was 15 per cent. was incorrect. I assume that the statement in the notice that the rent is 45*l.* is correct.

Is that a good notice of increase within the provision to which I have referred? The corresponding provision of the Increase of Rent, &c. (War Restrictions), Act, 1915—namely, s. 1, sub-s. 1 (vi.)—stated that: "Wherever an increase of rent is by this Act permitted, no such increase shall be due or recoverable until the expiry of four clear weeks after the landlord has served upon the tenant a notice in writing of his intention to increase the rent," and it then went on to require that the notice should be accompanied by certain particulars. That enactment thus only required that the notice should be given in writing and with a certain measure of particularity. The Act of 1920, which repeals the Act of 1915, provides by s. 3, sub-s. 2, that no such increase shall be due or recoverable until the expiry of one or other of the periods there mentioned after the landlord has served upon the tenant "a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to this Act, or in a form substantially to the same effect." That provision increases the stringency of the legislation in two respects, first, by requiring that the notice shall be a "valid" notice, and, secondly, by providing a statutory form of notice and requiring that the notice shall be in accordance with that form. As to the first of these requirements, it is to be observed that the word "valid" means more than correct in form. It means correct not only in form but also in substance. If it had only been intended that the notice should be correct in form there would have been no reason why the present Act should not have contained the same provision as the earlier Act contained. There must have been some reason for the insertion of the term "valid" in the amending Act. I think the term was inserted because it was intended that the notice should be correct in substance

as well as in form, and should accurately state all material facts, including the amount of the increase of rent which the landlord has a legal right to claim. As to the requirement that the notice should be in accordance with the statutory form, it is to be observed that the form makes provision for the accurate statement of the percentage of increase under s. 2, sub-s. 1 (*c*).

It has been urged on behalf of the plaintiffs that, if, in every case in which a landlord gave a notice of increase claiming more than he was entitled to, the notice was invalid and could not be corrected, great difficulty and trouble would arise. That objection has already been dealt with and sufficiently answered by my Lord.

In my opinion a notice of increase of rent is not a valid notice under the Act unless the increase which it states is an increase which the landlord has a legal right to claim. Here the notice states an increase which the plaintiffs had no legal right to claim—namely, 15 per cent. of the net rent instead of 5 per cent. By reason of that inaccuracy I think that this notice, although in other respects in substantial accordance with the requirements of the Act, is invalid.

Appeal dismissed.

Solicitors for plaintiffs: *Merriman, White & Co.*
Solicitors for defendant: *Jutsum & Jones.*

J. R.

C. A.
1922
Feb. 13.

[IN THE COURT OF APPEAL.]

NEWELL *v.* CRAYFORD COTTAGE SOCIETY.

Emergency Legislation—Landlord and Tenant—Weekly Tenancy—Notice of Intention to raise Rent—Necessity of Notice to Quit—Increase of Rent, &c., Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 3, *sub-s.* 1.

Before the landlord of a house let on a weekly tenancy to which the Increase of Rent, &c., Act, 1920, applies can claim to increase the rent to the extent authorized by that Act he must have given the tenant a notice to quit and that notice must have expired.

APPEAL of the defendant society from the judgment of Lord Sterndale M.R. and Atkin L.J. sitting as a Divisional Court, on appeal from the Dartford County Court.

The plaintiff, Newell, was tenant to the defendants of a house at Crayford in Kent on a weekly tenancy at a rent, prior to August, 1920, of 9*s.* 6*d.* per week.

On August 7, 1920, the defendants gave the plaintiff notice of intention to increase the rent by the sum of 1*s.* 10½*d.* per week from September 6. It was not disputed that the amount of the increase was authorized under the Act. But the defendants did not give the plaintiff any notice to quit either before service of notice of increase or at all. The plaintiff paid the increased rent from September 6 until November 26, and subsequently pending the proceedings. On it being brought to his notice that the increase was irregular he commenced this action in the county court to recover the sum of 3*l.* 7*s.* 6*d.*, being the amount of the increase of 1*s.* 10½*d.* for a period of thirty-six weeks, on the ground that the increase was invalid under s. 3, sub-s. 1, of the Increase of Rent, &c., Act, 1920 (1), by reason of the defendant's omission to serve a notice to quit determining the tenancy.

(1) By s. 3, sub-s. 1, of the Increase of Rent, &c., Act, 1920: "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession, or any increase in the rate of interest on a mortgage except in respect of a period during which, but for this Act, the security could be enforced."

The county court judge gave judgment for the plaintiff for the amount claimed. The Divisional Court without giving any formal judgment held that the sub-section meant what it said and affirmed the county court judge's decision. The defendants appealed to the Court of Appeal.

Schiller K.C. and *Ronald Walker* for the appellants. In such a case as the present the actual giving of a notice to quit is not an essential condition of the landlord's right to increase the rent. The words of the sub-section are not "would be entitled to possession" but "would be entitled to obtain possession." To satisfy those words it is enough that during the period in respect of which the increased rent is claimed the landlords might, if they had been so minded, have obtained possession by simply giving a notice to quit. As the giving of such a notice was a matter which depended entirely upon themselves, they were entitled to obtain possession even before they gave the notice, though they could not be entitled to the actual possession until after notice given and expired. Here the period in respect of which the increased rent was claimed was a period of thirty-six weeks from September 6; and as the appellants were in a position on August 30 to give a week's notice to expire on September 6, and thenceforward could have given a similar notice from time to time, they were entitled to obtain possession during the whole period for which the increase of rent was claimed. It would have been otherwise if during that period the tenant had been in possession of a term of years which was unexpired. Light is thrown on the meaning of the words under discussion by the concluding words of the sub-section which prohibit "any increase in the rate of interest on a mortgage except in respect of a period during which, but for this Act, the security could be enforced." The Act deals with increase of rent and increase in the rate of interest on a mortgage on the same footing. Just as s. 5 prohibits the recovery of possession except under the special circumstances therein specified, and thereby renders futile the service of a notice to quit, so s. 7 prohibits the calling in of a mortgage so long

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as the mortgagor pays his interest and performs the other covenants of the mortgage deed. But it has never been suggested that a mortgagee who desires to increase his rate of interest must go through the idle preliminary of giving a formal notice calling in the mortgage, although he knows that such a notice can have no effect. But if the giving of a notice which must be inoperative is unnecessary in the one case it ought equally to be held unnecessary in the other. It must be conceded that *Peizer* v. *Federman* (1), a decision of Horridge and Shearman JJ., is directly opposed to the present contention, but that case is not binding in this Court. In *Hill* v. *Hasler* (2), in which case Lord Sterndale M.R. and Atkin L.J. were sitting as a Divisional Court, it was not necessary to decide whether a notice to quit was a condition of a valid notice of increase, as such a notice was in fact there served, and the question for the Court was whether, in order to entitle the landlord to obtain possession, he must not only have served a notice to quit but must also have obtained an order for possession from the Court. The judgments of both members of the Court assumed that a notice to quit was a condition precedent to a valid increase of rent, while Atkin L.J. expressly said so, but that dictum was only obiter. Therefore, apart from the fact that their Lordships were not sitting as members of the Court of Appeal, their judgments are not binding here. The same observations apply to *Shuter* v. *Hersh* (3), where Bankes and Scrutton L.JJ., sitting also as a Divisional Court, made the same assumption that a notice to quit was essential, though it was unnecessary to decide the point, as the question there was whether, the tenant having held over after a notice to quit and so having become a statutory tenant, it was necessary to serve a further notice to quit with each subsequent notice of further increase of rent. The result is that this question is now raised in the Court of Appeal for the first time.

Croome Johnson and *G. Moseley* for the respondent were not called upon.

(1) [1921] W. N. 320. (2) [1921] 3 K. B. 643.
(3) Ante, p. 438.

BANKES L.J. In this case the plaintiff was tenant to the defendants under a weekly tenancy of a house at Crayford to which the Increase of Rent, &c., Act applied. The defendants were desirous of raising the rent, and on August 7, 1920, they gave the plaintiff a month's notice of intention to increase the rent as from September 6, 1920. The tenant complied with the notice, and from September 6 onwards for a period of thirty-six weeks paid the increased rent. Apparently somebody suggested to the plaintiff that the landlords had not taken the proper steps to justify the increase of rent, inasmuch as they had not previously to September 6, or at any time, given the plaintiff notice to quit; and accordingly this action was brought in the county court to recover back the increase of rent so paid. The county court judge held that the absence of a notice to quit determining the tenancy disentitled the defendants to claim the increased rent and gave judgment for the plaintiff, and that judgment was affirmed by the Divisional Court. The question turns upon the construction of s. 3, sub-s. 1, of the Increase of Rent, &c., Act, 1920. That Act having permitted by s. 2 certain increases of rent to be made by landlords, proceeded by s. 3, sub-s. 1, to impose the following limitation upon such increases. "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession." Now the period in respect of which in the present case the increase of rent was claimed and paid was a period of thirty-six weeks from September 6. Would then the defendants have been entitled during the whole of that period to obtain possession of the house but for this Act? What is meant by the words "entitled to obtain possession"? That question has already been discussed in *Hill* v. *Hasler* (1), where a Divisional Court, consisting of Lord Sterndale M.R. and Atkin L.J., held that they meant "would have a legal right to possession," which legal right commences, in the case of tenancies determinable by notice to quit, immediately on the expiry of the notice. The contention in that case put forward on behalf of the

(1) [1921] 3 K. B. 643.

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Bankes L.J.

tenant and negatived by the Court was that the landlord was not entitled to obtain possession within the meaning of the Act until he had obtained an order of the Court to enforce his right. What was contended on behalf of the landlords in the present case was that they were entitled to obtain possession not merely where, the tenancy being terminable by notice to quit, they had in fact given a notice which had expired before the commencement of the period for which the increased rent was claimed, but also where during the whole of that period they were in a position to acquire a right to possession by taking the simple step of giving a notice to quit, as distinguished from a case in which, the tenancy being for a term of years, no such step would be available. With that contention I cannot agree. In my opinion the language of the section admits of but one construction—namely, that where notice to quit is a necessary preliminary to the acquisition of a right to possession the landlord should in fact have given that notice. The result is that in the present case, as the tenancy was a weekly one and the defendants could only have become entitled to obtain possession by giving a week's notice to quit and have not done so, they were not entitled to claim any increase of rent. It is to be observed that there are, in connection with this subject, three different classes of tenancies to be considered: tenancies for a term of years, which expire by effluxion of time; yearly, monthly, and weekly tenancies, which are determinable by notice; and statutory tenancies, where the tenant after a notice to quit holds over under the provisions of the Increase of Rent, &c., Act. It is in the second of those classes alone that a notice to quit is necessary as a condition of a valid increase of rent. In the first class the rent cannot be increased until the term has run out, but upon its expiry a notice of intention to increase the rent will be valid without more. With regard to the third class Scrutton L.J. and myself in *Shuter* v. *Hersh* (1) held that a statutory tenancy stood on the same footing as a tenancy which had expired by effluxion of time, and that no further notice to quit was necessary to validate subsequent

(1) Ante, p. 438.

increases of rent. This is the first case in which the present question has been raised in the Court of Appeal, but in *Peizer* v. *Federman* (1) it was expressly decided by a Divisional Court that in the case of a weekly tenancy it is necessary that a notice to quit should have been given and that that notice should have expired before the period begins to run in respect of which a landlord can enforce a claim for increased rent under the statute. With that decision I entirely agree.

SCRUTTON L.J. In this case a weekly tenant claims to recover back from his landlords certain increases of rent which he has paid for a period of thirty-six weeks from September 6, 1920. He claims to do so under s. 14, sub-s. 1, of the Increase of Rent, &c., Act, 1920, which provides that if a sum has been paid on account of rent which is by that Act irrecoverable by the landlord the sum so paid may be recovered back from the landlord by the tenant. Sect. 2 provides that no increase of rent shall be recoverable by the landlord unless it comes within certain permitted increases. Then s. 3, sub-s. 1, says that: "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession." Now would the landlord here have been entitled to obtain possession in respect of the period of thirty-six weeks from September 6? It appears to me that there can be only one answer to that question. Not having given any notice to quit he would not have been so entitled. It seems to me that in the case of all tenancies which are determinable only by notice to quit, whether they be yearly, monthly, or weekly tenancies, if the landlord wants to increase the rent he must first serve a notice to quit, and until that notice expires he is not in a position to increase it. I think that Bankes L.J. and myself decided rightly in *Shuter* v. *Hersh* (2), sitting as a Divisional Court, that where a tenant by holding over after expiry of a notice to quit has become a statutory tenant under the Act no fresh notice to quit is necessary as a condition of a

(1) [1921] W. N. 320. (2) Ante, p. 438.

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Scrutton L.J.

valid claim to increased rent. That did not directly decide the present point; but it assumed it. It implied the existence of a general rule to which the statutory tenant was an exception. However in *Peizer* v. *Federman* (1) the point was expressly decided and, I think, rightly. I also think that the decision in *Hill* v. *Hasler* (2), where two other members of the Court of Appeal were sitting as a Divisional Court, was correct. For these reasons I agree that the appeal should be dismissed.

YOUNGER L.J. The question we have to determine in this case is whether the landlord of a house let on a weekly tenancy can be held to be "entitled to obtain possession" of it within the meaning of s. 3, sub-s. 1, of the Increase of Rent, &c., Act, 1920, before he has served upon the tenant a notice to quit and before that notice has expired. Now I confess myself that if I were dealing with this question apart from authority I should struggle to maintain the position that Parliament did not in a case of this kind require a perfectly useless formality to be gone through before the increase of rent which the statute authorizes could be made effective. So long as this Act is in force a notice to determine a weekly tenancy to which the Act applies is so much waste paper. It is of no use for any purpose whatever. It is of no more use than a notice given to a tenant to determine a statutory tenancy. In either case it is ineffectual to get rid of the tenant. But it has been decided that in the case of a statutory tenancy the rent may be increased without any notice to quit being given to the tenant at all. If then the contractual tenancy and the statutory tenancy stand on the same footing in relation to a notice to quit, the rent ought equally to be capable of being increased in the case of a contractual tenancy without any notice to quit being given. I had hoped that we might be able to arrive at what seems to me the more reasonable conclusion in this case by reference to an analogy which I suggested to counsel in the course of argument. It is, I think, well recognized that the rule against

(1) [1921] W. N. 320. (2) [1921] 3 K. B. 643.

perpetuities does not apply to an estate tail, and the reason why it does not apply is, not that an estate tail if it goes on indefinitely is not within the mischief aimed at by the rule, but because a tenant in tail can at any moment put an end to the entail by merely filing a disentailing assurance, and can do so without asking anybody's leave. The law looks at the substance of the thing rather than at the form, and, because of the tenant in tail's power of getting rid of the entail of his own motion, treats him for the purpose of the above rule as being in the same position as if he had exercised that power. So here the landlord of a house let to a weekly tenant may of his own motion without asking any one's leave give the tenant a week's notice to quit. But such a notice if given would by reason of the provisions of the statute be perfectly nugatory. Why should the landlord be required to give it? On principle and apart from authority I should be prepared to resist the conclusion that such a formality was required, where the notice increasing the rent intimated that the increase was not to commence until after the date at which a notice to quit, if one had been served along with the notice of increase, would have expired. But I think that we are really bound by authority to the contrary. At all events I bow to the opinion of my brothers that the words of the Act are too strong to allow of the rational interpretation that I have suggested being placed upon it. Although the notice to quit is a mere idle formality in such a case as this, I nevertheless feel constrained to the conclusion that, as the landlord would not apart from the Act be entitled to obtain possession within the meaning of s. 3, sub-s. 1, until after he had given that notice, he must now go through that formality, useless though it be.

I agree therefore that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Linklaters and Paines.*
Solicitor for the respondent: *W. H. Thompson.*

J. F. C.

C. A.
1922
Feb. 15.

[IN THE COURT OF APPEAL.]

CRUISE *v.* TERRELL.

[1921. C. 1752.]

Emergency Legislation—Landlord and Tenant—Statutory Tenancy—Tenancy for Term certain—Expiry—Landlord's Common Law Right of Re-entry—Relation back of subsequent Order for Possession—Measure of Damages—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 5; *s.* 8, *sub-s.* 3; *s.* 12, *sub-s.* 2; *s.* 15.

A cottage was let to tenants for a year certain at an annual rental of 8*l.* and occupied only by them for week-ends and holidays. The landlord re-entered on the expiration of the term in the absence of the tenants and subsequently obtained an order for possession on one of the grounds permitted by s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The tenants brought an action for trespass and recovered 60*l.* damages. On appeal:—

Held (1.) that the Act applied to a term certain as well as to a periodic or continuing tenancy; (2.) that the landlord was not entitled to exercise his common law right of re-entry at his peril, on the ground that he was entitled to an order for possession under s. 5 of the Act; and that a subsequent order for possession did not relate back to the date of his entry; (3.) that notwithstanding such subsequent order for possession, the statutory tenants had possession in law sufficient to support an action against the landlord for trespass by re-entry.

But held that in the absence of "outrageous conduct" or special damage the tenants were not entitled to recover more than the actual amount of the damages they had suffered by the temporary disturbance of their possession.

Dicta in *Remon* v. *City of London Real Property Co.* [1921] 1 K. B. 49 approved and applied.

Decision of Darling J. affirmed with a variation as to the amount of the damages.

Appeal by the defendant from a judgment of Darling J. sitting without a jury.

By a verbal agreement made in September, 1919, the defendant agreed to let a cottage at Ashmansworth, Hants, to the plaintiffs for a year certain at a rent of 8*l.* payable in advance. The rent was paid and in the following year a further 8*l.* was paid for the year ending March 25, 1921. In the early part of 1921, the defendant's wife wrote to the plaintiffs stating that owing to increased rates and the cost of repairs the rent would have to be doubled. The defendant

also wrote to the plaintiffs stating that they did not belong to the village and only took the cottage for amusement, and that though he might be willing to let it to a villager on terms which might mean a loss, he was not prepared to do that in the case of "week enders." The plaintiffs only required the place as an occasional residence, whereas the defendant said that he wanted it for a gamekeeper who was in the whole-time employment of a tenant to whom he had let sporting rights.

On April 1, 1921, the plaintiffs tendered another year's rent, but this was refused, and on April 7 the defendant in the absence of the plaintiffs sent the local blacksmith to the cottage, who broke into the premises and put a new lock upon the door and locked it. The defendant also threatened to remove the furniture, and put it into a barn.

The plaintiffs thereupon commenced the present action, by which they sought to restrain the defendant from moving, or interfering with, their goods and chattels at the cottage.

The defendant by his defence pleaded that the plaintiffs were trespassers as their tenancy had terminated, and he counterclaimed for possession of the cottage.

Darling J. held that the plaintiffs were statutory tenants under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and were therefore not trespassers on April 7, when they were turned out. The plaintiffs, although they had used the cottage as a pleasure house, had made out their case, and there would be judgment for them on their claim. On the counterclaim for possession, while there was no adequate alternative accommodation for the plaintiffs, yet it would be a greater hardship to refuse the defendant possession of the cottage than it would be on the plaintiffs to grant it. The defendant was acting in good faith, when he let the shooting to a sporting tenant, Mr. Turner, and promised him the cottage for a gamekeeper in his whole-time employment. But he had no right to treat the plaintiffs as trespassers. His Lordship accordingly awarded them 60*l.* damages with costs. On the counterclaim he made an order with costs for immediate possession, or an undertaking by

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the defendant that the plaintiffs were to have a month to remove their goods.

The defendant appealed. The appeal was heard on February 15, 1922.

J. H. Menzies for the appellant. The learned judge was wrong in holding that the defendant committed an actionable wrong in re-entering.

1. The Rent Restrictions Act, 1920, does not apply to a tenancy for a fixed term which expires by effluxion of time. It applies only to continuing tenancies of growing interests. The letting is therefore not within the Act.

This distinction between continuing tenancies and tenancies for a fixed term was clearly in the mind of the Legislature when it passed the Rent Restriction Act of 1915. The intention was to protect tenants who had these continuing tenancies and to leave out of consideration those tenants who had protected themselves by contract. A weekly or monthly tenancy is not a tenancy for a fixed term, but a tenancy from year to year determinable on a week or a month's notice.

It is admitted that there have been decisions in which there have been dicta which would cover fixed terms, but it is submitted that in no reported case has the point been actually decided: *Remon* v. *City of London Real Property Co.* (1)

[WARRINGTON L.J. Sect. 15 of the Act seems to be conclusive against you.]

It is submitted that there is nothing in that section inconsistent with the view that the Act only contemplates continuing tenancies. The use of the word "let" in s. 12, sub-s. 1, strongly supports that view. The word "let" can be interpreted with reference to a continuing tenancy but not with reference to a fixed tenancy.

[*Shuter* v. *Hersh* (2); *Rees* v. *Marquis of Bute* (3) and *Gilbert* v. *Jordan* (4) were also referred to.]

(1) [1921] 1 K. B. 49.
(2) Ante, p. 438; 38 Times L. R. 127.
(3) [1916] 2 Ch. 64.
(4) [1920] W. N. 309.

2. But assuming that fixed terms are within the Act and that on March 25, 1921, the plaintiffs were statutory tenants, it is submitted that the landlord was entitled to exercise his common law right of peaceable re-entry, provided that the case was one in which the Court could grant him an order for possession. The point was taken in *Remon* v. *City of London Real Property Co.* (1) There the tenancy had expired by notice to quit, but the tenants had not gone out.

[WARRINGTON L.J. The landlord went into possession on the day after the Act came into force.

LORD STERNDALE M.R. If the headnote to that case is correct it looks as if the point was decided.]

There the landlord had not satisfied the conditions precedent required by the statute entitling him to re-enter. Here the landlord has done so and was therefore entitled to an order for possession: *Barton* v. *Fincham.* (2) It is submitted that it is wrong to read into a statute more than is necessary to enable its provisions to be carried out.

The persons entitled to protection against eviction are a clearly defined class and it is to them that the remarks of Bankes L.J. in *Remon's Case* (1) are applicable.

The position of a statutory tenant under the Act is that of a protected trespasser. There is no suggestion of a forcible re-entry in this case. Under the Act the right of peaceable re-entry remains, but the landlord exercises that right at his peril.

3. If however the contention on behalf of the landlord is wrong and he was not entitled to re-enter then it is submitted that the plaintiffs have here suffered no damage. There is no evidence of any damage beyond a suggestion that the plaintiffs have suffered damage by having to purchase furniture. It is submitted that the utmost the plaintiffs are entitled to is the rental for three or four months of the cottage, which would amount to a few pounds.

J. B. Melville for the plaintiffs was called upon as to the amount of the damages awarded. In assessing the damages the Court is entitled to look at all the facts. The plaintiffs

(1) [1921] 1 K. B. 49. (2) [1921] 2 K. B. 291.

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were here subjected to indignity by being ejected from their cottage. *Merest* v. *Harvey* (1) shows the principle upon which the Court acts in awarding damages in a case like the present. There was here a threat to remove the plaintiffs' furniture and put it into a barn.

[He also referred to *Emblen* v. *Myers* (2) and *Kimpson* v. *Markham*. (3)]

LORD STERNDALE M.R. This is an appeal from a decision of Darling J., which raises a difficult question on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendant had let a certain cottage to the two plaintiffs for a year certain at a rent of 8*l*. and after the expiration of the first year the tenancy was continued for another year certain. At the end of that period the defendant wanted to raise the rent to 16*l*. The plaintiffs objected. The landlord desired to obtain possession of the premises. No notice to quit was served, as none was necessary. But he said he wanted to get possession and the plaintiffs refused to give it. Correspondence ensued. One of the plaintiffs wrote claiming to retain possession of the cottage under the Increase of Rent Restriction Act, 1920, on the ground that they were tenants from year to year—which they clearly were not—or alternatively that they were statutory tenants and that under the Act the rent could not be increased. The landlord took possession of the cottage. In the absence of the plaintiffs, who did not live there regularly, he obtained possession of the cottage and put a new lock on the door and locked it. It is said that he threatened to remove their furniture, but did not proceed with his threat.

The plaintiffs brought an action against him for trespass. The landlord counterclaimed for possession on the ground that he required the cottage for the use of the keeper of his shooting tenant. Darling J. found that the entry was not justified, but that the landlord was entitled to possession of the premises and awarded the plaintiffs 60*l*. damages on

(1) (1814) 5 Taunt. 442. (2) (1860) 6 H. & N. 54.
(3) [1921] 2 K. B. 157.

their claim. He also held on the counterclaim that the defendant really required the cottage and made an order for possession, which is not appealed against. The defendant appeals against the order on the plaintiffs' claim. It is contended that the Act does not apply in any way to a tenancy for a term certain, and therefore the letting was not within the Act. I cannot understand how it can be said that the sections of the Act which apply to all lettings do not apply to a letting for a term certain. Such a contention is contradicted by expressions which occur in various parts of the Act. I see no ground for that contention.

The next point is that assuming the Act does apply and that the plaintiffs are statutory tenants, the Act does not prevent a landlord from exercising a right of re-entry where he is entitled to an immediate order for possession under s. 5 of the Act, which order it is contended when obtained relates back to the date of his entry. That point was, however, decided against the appellant in *Remon* v. *City of London Real Property Co.* (1) It is said that in the judgments in that case the point is dealt with by dicta only. In my opinion they are not dicta, but, even if they are, they are dicta from which we ought not to differ, and by which we are bound.

Then there is another question. It is said that there can be no damages here because an immediate order for possession has been made and therefore it must be inferred that the landlord had a right to re-enter when he did. But for the Act the landlord could re-enter at his peril. If he recovered judgment well and good. If he was wrong he paid damages to the tenant. It is said that if he recovers judgment for possession the order relates back to the date of his original entry.

It is sought to apply that to this case. Here the plaintiffs were statutory tenants at the date of the re-entry and continued to be so until the landlord satisfied the Court that he was entitled to possession for one of the seven causes mentioned in s. 5 of the Act.

I think the statutory tenancy continued until the order

(1) [1921] 1 K. B. 49.

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Lord Sterndale M.R.

was made, and until it was made the plaintiffs were not trespassers. The landlord's entry therefore was wrongful.

That leaves only the question of damages. The learned judge has awarded 60*l.* damages, and he has also found that the landlord did no actual damage to the house or furniture and that "there was no high-handed outrage perpetrated—not in the least." The landlord acted under an erroneous claim of right. The learned judge then proceeded to assess the damages at 60*l.* I am sorry to say he gives no reason to show how he arrived at that sum. I cannot see how this sum can be justified on the evidence. It is not usually desirable to interfere with the judgment of a Court on a question of damages, but when it is found that there is no evidence of aggravation vindictive damages ought not to be given. Here the plaintiffs were deprived for some three or four months of the use of the cottage, a matter of only 3*l.* or 4*l.* They gave no evidence of any special damage in having been put to expense in finding other cottage accommodation. The judge's finding means that there were no aggravated circumstances. In that case the amount of the damages cannot be justified, and I think we should be treating the plaintiffs very liberally in awarding them 10*l.*

In *Whitham* v. *Kershaw* (1) Bowen L.J. said: "I wish to add that nothing we have said must be understood as in any way derogating from the principle that, when a wrongful act is done by a trespasser, or by a tenant to the property of his reversioner, under circumstances which call for vindictive damages, the jury may give vindictive damages. There is, however, nothing of that kind in the present case."

The judgment will be varied by altering the sum of damages from 60*l.* to 10*l.*, and the rest of it will stand, but I think as the defendant has failed on the legal points there should be no costs of the appeal.

WARRINGTON L.J. I am of the same opinion. The appellant has raised three points before us. The first is that the Rent Restriction Act, 1920, does not apply to tenancies for a

(1) (1885) 16 Q. B. D. 613, 618.

fixed term. I like the Master of the Rolls have had great difficulty in seeing on what ground that argument is rested. I think such cannot be the construction of the statute. I will test the argument by an examination of certain of the sections of the Act. By s. 12, sub-s. 2: "This Act shall apply to a house or a part of a house let as a separate dwelling"—then follow the various rents within the limits of which the Act applies—"and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies." That is a clear provision that every house let by a landlord to a tenant at a certain standard rent is a house to which the Act applies. It may well be that so long as the tenancy lasts, the Act does not come into operation, but it applies all the same. Sect. 15 to my mind makes the matter perfectly plain. It provides by sub-s. 1 that "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies, shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act." There is nothing there said to suggest that the tenancy referred to must be a continuing tenancy and not a tenancy for a fixed term. The sub-section continues: "and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice." Again to go back, s. 8 of that section contains a provision (sub-s. 3) that "This section shall not apply to the grant, renewal or continuance for a term of fourteen years or upwards of any tenancy" thereby clearly indicating that tenancies for a fixed term were within the purview of the Act.

The second point, that on the date when the defendant entered the plaintiffs were mere trespassers, has been disposed of by the decision in *Remon* v. *City of London Real Property Co.* (1) There the landlords went into possession

(1) [1921] 1 K. B. 49.

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without an order in the same way as the landlord did in this case and the action was brought for an injunction to restrain them, and it is clear that there would have been no right of action unless the tenant were a statutory tenant under s. 15. Bankes L.J. there said (1): "It is however clear that in all the Rent Restrictions Acts the expression 'tenant' has been used in a special, a peculiar sense, and as including a person who might be described as an ex-tenant, some one whose occupation had commenced as tenant and who had continued in occupation without any legal right to do so except possibly such as the Acts themselves conferred upon him. The respondent therefore on the coming into operation of the new Act was a tenant within the meaning of that expression in the Act, and as the Act for the first time included business premises within its protection, the premises were not excluded on the ground that they were business premises only." And later on in his judgment he expressed the view that the tenant was a person remaining in possession by virtue of the provisions of the Act. Scrutton L.J. said the same thing. That decision is binding upon this Court, but even without it I should have taken the same view. It is quite clear that a person holding over is not to be treated as a trespasser.

The third point is whether the defendant was guilty of a wrongful act for which the plaintiffs are entitled to damages. If I am right on the second point of course the plaintiffs were entitled to some damages. The learned judge was, however, not justified in awarding 60*l.* damages for four months' dispossession on a rental of 8*l.*, there having been no evidence of any special damage, nor of any wrongdoing on the part of the defendant. On that point I agree with the Master of the Rolls that 10*l.* are ample damages.

SCRUTTON L.J. I agree. I need not repeat the facts, as they have already been stated by the Master of the Rolls. But for hearing the argument I should have thought the appellant's first point was unarguable, and having heard it I still think so. It is that the Act applies only to continuing

(1) [1921] 1 K. B. 54, 58.

tenancies and not to tenancies for a fixed term. That appears to me to involve reading into s. 12, sub-s. 2, of the Act the words "except where the letting is for a fixed term." I do not see my way to inserting those words. The other sections which have been referred to by the Lord Justice make it quite plain that no such limitation ought to be imposed on the sub-section.

As the second point it was said that the Act did not destroy the common law right of the landlord to enter. It will not help him to enter, but if he gets in peaceably he is in his right. It is that argument that as a member of the Court in *Remon* v. *City of London Real Property Co.* (1) I listened to from Mr. Romer, and in my view we decided against it. It is true that in that case the landlord had not obtained an order for possession under s. 5 of the Act, as he did here, but in my view the object of the Act was to fetter landlords and to take away their common law rights, and until an order was obtained against him, a tenant stayed on, not as a trespasser, but as a statutory tenant—even against the will of the landlord. If the words of Bankes L.J. and myself in *Remon's Case* (1) which cover this point were obiter, they are now affirmed.

As to the damages, in cases of high-handed or insulting conduct exemplary have been awarded and allowed to stand by the Court of Appeal. But here I respectfully adopt the view of Bowen L.J. in *Whitham* v. *Kershaw* (2) that where there are no aggravating circumstances the damages awarded should be limited to the actual damages proved. The plaintiffs here have not proved any special damage and in my view 10*l.* at the outside would cover the whole of the damage suffered.

Order varied as to amount of damages.

Solicitors for appellant: *H. H. Behrend & Co.*
Solicitor for respondents: *W. Ewart Craigen.*

(1) [1921] 1 K. B. 49. (2) 16 Q. B. D. 613, 618.

W. I. C.

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Jan. 12, 13, 20.

REX *v.* WOOD.

Ex parte ANDERSON.

Revenue—Excise—Motor Goods Lorry—Occasional use as Hackney Carriage—Use for Purpose other than that for which licensed—"To be used solely for a certain purpose"—Finance Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *Sch. II., para.* 6—*Roads Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 72), *s.* 8, *sub-s.* 3.

Sch. II. to the Finance Act, 1920, in paras. 1–5, classifies mechanically-propelled vehicles according to the purposes for which they are to be used, and specifies the rate of licence duty payable by each respectively under s. 13 of the Act. Para. 6 specifies the duty payable in respect of vehicles "other than those charged with duty under the foregoing provisions of this schedule." By s. 8, sub-s. 3, of the Roads Act, 1920: "Where a licence has been taken out as for a vehicle to be used solely for a certain purpose and the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty."

The appellant took out a licence under para. 6 of Sch. II. to the Finance Act, 1920, in respect of a motor lorry. The lorry was usually used for the conveyance of goods, but on the occasion charged was used by the appellant as a hackney carriage, the duty payable on its use as a hackney carriage being higher than the rate chargeable in respect of the licence held by him:—

Held, that the licence held by the appellant under para. 6 of Sch. II. to the Finance Act, 1920, had not been "taken out as for a vehicle to be used solely for a certain purpose" within the meaning of s. 8, sub-s. 3, of the Roads Act, 1920, and consequently that the penalty therein imposed was not payable by him.

Rule Nisi to the justices of Prescot, Lancashire, for a mandamus to state a case. By consent treated as the case stated on the facts appearing in the affidavits.

An information was preferred on May 30, 1921, by William Kenyon, a superintendent of police, against Arthur Anderson (herein called the appellant) charging that he, having taken out a licence under the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), to use a certain motor lorry, which licence was then in force, did on May 14, 1921, unlawfully use the said lorry for a purpose other than that for which it was licensed, the purpose for which it was being used being chargeable at a

higher rate of duty than that for which the said lorry was licensed.

On January 29, 1921, a licence was taken out in respect of the said vehicle under para. 6 of Sch. II. to the Finance Act, 1920 (1), at a cost of 21*l.*, being at the rate of 1*l.* per unit of horsepower, and this, on May 14, 1921, was the only licence in force in respect of the said lorry. On that date the lorry was hired to carry the Gossage football team from Widnes to St. Helens and back, and in fact did so, and it was admitted in argument that on this occasion it was used as a hackney carriage. Each member of the team paid his share of the hire. The said lorry was not used solely for any of the purposes set forth in paras. 3, 4 or 5 of the said Sch. II. (1) It was used generally for the conveyance of goods, but was used occasionally, as on May 14 above mentioned, for the purpose of taking passengers to neighbouring places. If licensed as a hackney carriage the cost of the licence would have been 36*l.*

It was contended on behalf of the prosecution that an offence had been committed by the appellant under the provisions of s. 8, sub-s. 3, of the Roads Act, 1920. (2)

(1) Finance Act, 1920 (10 & 11 Geo. 5, c. 18), Sch. II.: "Duties on Mechanically-propelled Vehicles. Description of Vehicle.

(1.) Cycles . . . . not exceeding 8 cwt. in weight unladen.

(2.) Vehicles (including cycles with an attachment for propelling the same by mechanical power) not exceeding 5 cwt. in weight unladen adapted and used for invalids. . . . .

(3.) Vehicles being hackney carriages as defined in s. 4 of the Customs and Inland Revenue Act, 1888. . . . .

(4.) Vehicles . . . . used solely in the course of trade, or in agriculture. . . . .

(5.) Vehicles (including tricycles weighing more than 8 cwt. unladen) constructed or adapted for use and used solely for the conveyance of goods in the course of trade . . . .

(6.) Any vehicles other than those charged with duty under the foregoing provisions of this schedule; Not exceeding 6 horse power or electrically propelled; . . . . Exceeding 6 horse-power. . . . ."

(2) Roads Act, 1920 (10 & 11 Geo. 5, c. 72), s. 8, sub-s. 3: "Where a licence has been taken out as for a vehicle to be used solely for a certain purpose and the vehicle is at any time during the period for which the licence is in force used for some other purpose, the person so using the vehicle shall, if the

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The justices convicted the appellant and imposed a fine of 10*l.* On July 5, 1921, application in writing was made by the appellant to the justices, the respondents, to state a case, and on July 7 they refused to do so. This rule nisi for a mandamus to state a case was then obtained.

Rowand Harker for the appellant. This conviction cannot be supported. The licence granted was not taken out as for a vehicle to be used solely for a certain purpose which it must be to come within sub-s. 3 of s. 8 of the Roads Act, 1920 (1), under which the charge is made, but was a licence under para. 6 of Sch. II. to the Finance Act, 1920 (2), which is a licence for the use of a vehicle for general purposes. *Strutt* v. *Clift* (3) where the owners of a van exempt under s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), from the necessity of a carriage licence as being used "solely for the conveyance of any goods or burden" were convicted of keeping a van without a licence where it had been used to carry persons on one occasion only, shows the necessity of taking out the licence under para. 6 of Sch. II. for use of the vehicle for general purposes.

R. P. Hills for the respondent. The object of the Roads Act, 1920, was to carry into effect the Finance Act, 1920, and it is governed by the schedule to the last-named Act. A licence under para. 6 of Sch. II. to the Finance Act is not a general utility licence, but a licence for the residuary purposes not covered by the previous paragraphs of the schedule. The purpose of using this vehicle as a hackney carriage, as this admittedly was used, is covered by para. 3 (2); therefore para. 6, which deals with purposes not covered by the preceding paragraphs, does not apply. "Purpose" in s. 8, sub-s. 3, of the Roads Act, 1920 (1), must be considered

rate of duty chargeable in respect of a licence for a vehicle used for that other purpose is higher than the rate chargeable in respect of the licence held by him, be liable to an excise penalty of an amount equal to three times the difference between the duty actually paid on the licence and the duty payable on a licence appropriate to a vehicle used for that other purpose or twenty pounds, whichever amount is the greater."

(1) See note (2) ante, p. 675.

(2) See note (1) ante, p. 675.

(3) [1911] 1 K. B. 1.

in connection with Sch. II. to the Finance Act, 1920, and means the several purposes referred to in the different sub-heads of that schedule, including those dealt with in para. 6. This charabanc, licensed for use for "a certain purpose"—i.e., one not covered by the other paragraphs of Sch. II.—was used for "some other purpose," covered by one of the paragraphs (para. 3), and the case is therefore within s. 8, sub-s. 3, of the Roads Act. Anything chargeable under paras. 1 to 5 of the schedule cannot come under para. 6.

[The judgment of Lord Parker of Waddington in *Drummond* v. *Collins* (1) and *Redgrave* v. *Clarke* (2) were referred to.]

Rowand Harker in reply. Even if this vehicle was not properly licensed, the justices were still wrong in convicting the appellant under s. 8, sub-s. 3, of the Roads Act. (3) The purposes enumerated in paras. 1–5 of Sch. II. to the Finance Act, which are "certain" purposes, are not the only purposes for which licences are issued, and para. 6 (4) includes all purposes other than those enumerated in the previous paragraphs. Primarily the vehicle in question comes under para. 5 (4), but it was thought right to take out a licence under para. 6 (4) as its use for other purposes was contemplated. Therefore the licence taken out by the appellant under para. 6 of Sch. II. was not "taken out as for a vehicle to be used solely for a certain purpose," and is therefore not within the meaning of that sub-section. The respondent must bring the case within the letter of the sub-section; it is not enough to show that it is within its spirit, or that if construed in a certain way property properly taxable will escape: per Lord Atkinson in *Attorney-General* v. *Milne* (5) and James L.J. in *Dyke* v. *Elliott.* (6) It may be that a loophole has been left in the Act.

[Para. 7 of the Road Vehicles (Registration and Licensing Regulations, 1921) (Provisional—dated March 9, 1921) was referred to.]

(1) [1915] A. C. 1011, 1018.
(2) Unreported. Divisional Court, Nov. 9, 1921.
(3) See note (2) ante, p. 675.
(4) See note (1) ante, p. 675.
(5) [1914] A. C. 765, 771.
(6) (1872) L. R. 4 P. C. 184, 191.

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LORD TREVETHIN C.J. having stated the charge against the appellant, continued: A rule nisi to state a case was granted, and by consent it was arranged to treat the affidavits as the case, and Mr. Harker, on behalf of the appellant, admitted that this vehicle was being used as a hackney carriage on May 14, the date of the alleged offence. The question is whether the appellant was committing this offence, and further, whether s. 8, sub-s. 3, of the Roads Act, 1920, which was relied on by the prosecution, applies to the appellant's action at all. The licence taken out in respect of this vehicle was under para. 6 of Sch. II. to the Finance Act, 1920, which schedule is divided into six paragraphs dealing with different descriptions of vehicles. [His Lordship read the paragraph. (1)] The motor lorry in question was licensed under para. 6, and the purpose for which it was generally used was the conveyance of goods, but occasionally it was used for the conveyance of pleasure parties, and it was being so used on the occasion in question. The point is whether s. 8, sub-s. 3, of the Roads Act, 1920, hits this case. [His Lordship read the sub-section. (2)] It is contended on behalf of the respondent that it does.

The prosecutor here is in this position. He must show that the licence taken out in respect of this vehicle was "taken out as for a vehicle to be used solely for a certain purpose," and he attempts to do so by showing that it was taken out under para. 6 of Sch. II. to the Finance Act, that is, for a vehicle to be used for a purpose other than those contained in the preceding paragraphs. I am of opinion that he cannot succeed because some of the preceding paragraphs deal with the case of a licence taken out solely for the purpose therein mentioned. The licence in question was not taken out in respect of a vehicle to be used solely for any purpose but for other than the purposes covered by the preceding paragraphs, and it seems to me, therefore, that construing s. 8, sub-s. 3, of the Roads Act (2), as a penal section, which it certainly is, one has to see whether there are not in

(1) See note (1) ante, p. 675. (2) See note (2) ante, p. 675.

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the schedule to the Finance Act (1) paragraphs which will satisfy the words in that sub-section of the Roads Act. There are such paragraphs, namely, paras. 4 and 5 dealing with licences taken out solely for certain defined purposes. The present licence was not such a one, and it cannot be said that it was taken out in respect of a vehicle to be used solely for a certain purpose. It was taken out for other purposes whatever they might be. I am by no means prepared to say that the licence taken out was the right licence to take out if it was intended to use this vehicle at any time as a hackney carriage, and it may be that the appellant would be liable under s. 13 of the Roads Act. But that is not the question we have to decide, and I am of opinion that this appeal should be allowed.

AVORY J. I have reluctantly come to the same conclusion, and wish to observe at the outset that those who framed this charge, for the purpose, apparently, of eliminating the difficulty, have omitted from the charge the material words which occur in sub-s. 3 of s. 8 of the Roads Act, and if the conviction has been drawn up in the same terms as the summons I think it will be bad upon the face of it. The summons is as follows: "That you on May 14, 1921 . . . . having taken out a licence under the Finance Act, 1920, to use a certain vehicle, to wit, a motor lorry, which said licence was then in force, unlawfully did use the said motor lorry for a purpose other than the purpose for which it was licensed, the purpose for which it was being used being chargeable at a higher rate of duty than that for which the said motor lorry was licensed." They have in the charge omitted the words in s. 8, sub-s. 3, of the Roads Act, which create the whole difficulty—namely, that this was a licence taken out "as for a vehicle to be used solely for a certain purpose," and I cannot suppose that this is a mere accident. I think the omission was made deliberately in order not to raise this difficulty.

The principle to be applied to the construction of such a

(1) See note (1) ante, p. 675.

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section as this is clearly laid down, although it may be said that we are adopting a narrow construction. In Maxwell on the Interpretation of Statutes, 6th ed., p. 503, is this passage: "It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. . . . . In a case of reasonable doubt the construction most beneficial to the subject is to be adopted." Is this a case where the construction of the sub-section admits of reasonable doubt? I do not hesitate to say that it does, even if it is not perfectly plain that in order to justify a conviction it must be established as the very foundation of the proceedings that a licence was taken out by the appellant as for a vehicle to be used solely for a certain purpose. It appears impossible to say that the licence in this case was taken out to be used solely for a certain purpose. It is said that in fact it has been taken out under para. 6 of Sch. II. to the Finance Act; but that does not enable us to say whether it has been taken out solely for a certain purpose. Para. 6 enables a licence to be taken out for a vehicle which is a vehicle of a character other than those already charged under the preceding paragraphs, and I think with my Lord that these latter paragraphs are merely classifications of the different kinds of vehicle which have to be licensed, while para. 6 describes a vehicle which is not one of those described in paras. 1–5. Although anxious to adopt the other construction—namely, that para. 6 applies to all vehicles to be used for any purposes other than those mentioned in paras. 1–5, I am unable, in a penal statute, to introduce words to produce that effect. There being paragraphs in Sch. II. which clearly specify vehicles to be used for particular purposes, it seems to me that on the proper and strict construction of sub-s. 3 of s. 8 of the Roads Act, its operation is limited to those cases where a licence has been taken out for one of the sole purposes mentioned in the schedule.

I only wish to add that I express no opinion whether

proceedings might in such a case be taken under s. 13 of the Roads Act, 1920. I think it is open to argument that a person who has taken out a licence under para. 6 and who during its currency uses the vehicle as a hackney carriage does not hold a licence under the Finance Act, 1920, and is therefore a person using a vehicle "for which a licence under the Finance Act, 1920, ... is not in force" within the meaning of s. 13. The decision of this Court in *Redgrave* v. *Clarke* (1) appears to support this view.

For these reasons I agree that the conviction was wrong and should be quashed.

McCARDIE J. Sect. 13 of the Finance Act, 1920, imposes certain duties on mechanically propelled vehicles. Sch. II. sets out the various classes of vehicle with respect to each of which a separate duty is imposed. In my opinion the effect of para. 6 of Sch. II. is that it relates to vehicles which do not fall within any of the preceding five paragraphs. If therefore a vehicle be, for example, a hackney carriage a licence must be taken out for it as for a hackney carriage under para. 3. A licence under para. 6 will not suffice. Unless that be so extraordinary results would follow, for here the appellant took out a licence under para. 6 and paid 21*l.* Having got his licence under para. 6 he used the lorry as a hackney carriage. If he had taken out a licence as for a hackney carriage under para. 3 he would have had to pay 36*l.*, and if the appellant was right all hackney carriage proprietors could take out their licences under para. 6, and though they might for the sake of appearances carry goods now and again, they could use their motors as hackney carriages, and an enormous loss to the revenue would thereby result. But the further question arises whether he comes within the penal section, s. 8, sub-s. 3, of the Roads Act, 1920. At the conclusion of the argument I inclined to the view that he did, but after hearing the judgments of my Lord and my brother Avory I am satisfied that my first impression was erroneous, and I respectfully adopt those

(1) Unreported. Divisional Court, Nov. 9, 1921.

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judgments. The words of the sub-section are not sufficiently clear, being penal in their character, to convict the appellant. I agree therefore that the conviction must be quashed.

Appeal allowed. Conviction quashed.

Solicitors for appellant : *Joynson-Hicks, Hunt, Cardew & McDonald.*

Solicitors for respondents : *Snow, Fox, Higginson & Thompson, for Sir Harcourt Clare, Preston.*

W. L. L. B.

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Feb. 1.

ATTORNEY-GENERAL *v.* SWAN.

Revenue—Entertainments Duty—Cricket Club—Annual Subscriptions of Members—Admission of Members to Cricket Matches—"Payments for admission to any entertainment"—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1, *sub-ss.* 1, 4, 6.

A cricket club had a playing-ground, vested in trustees for the club, on which matches were played. The public was admitted on payment. Members paid an annual subscription which gave them, among other privileges, that of admission as spectators. The matches were admitted to be "entertainments" :—

Held, that although the members might be joint owners of the club property, it was still a question of fact whether the payments of subscriptions or any part thereof were made for the purpose of securing "admission to any entertainment" within the meaning of s. 1, sub-s. 1, of the Finance (New Duties) Act, 1916.

Where the Commissioners found that a portion of the subscriptions was paid for admission to the matches, that portion was held liable to the entertainments duty imposed by the sub-section.

INFORMATION by the Attorney-General claiming from the defendant, Henry Dawes Swan, 103*l.* 4*s.* for entertainments duty.

It appeared by an agreed statement of facts that the Essex County Cricket Club (called herein "the club") is an unincorporated members' club formed in 1874 for the purpose of playing, promoting and encouraging cricket and other games and sports in Essex. Under the rules of the club a committee of management, of which the defendant

was the chairman, had the sole management of the ground and club property and funds and of the fixing of matches. Pursuant to the rules trustees had been appointed and the 10½ acres of freehold ground at Leyton on which matches were played was vested in them throughout 1919 as trustees for the club (called herein "the ground"). The minimum annual subscription was 1*l.* 1*s.* for men and 10*s.* 6*d.* for ladies, payable on January 1. There was always an annual deficit which was made up by additional contributions from the members. A member who had paid his annual subscription in 1919 was entitled to all the rights which were given by the rules and deed of trust, including a right, on showing the member's ticket, if demanded, of entry to the ground without further payment when matches were being played to which the public was admitted for payment, as well as on any other day. At other times, between sunrise and sunset, members could practise at the nets, play bowls, etc., on the ground, and refreshments could be obtained. Some of the members played such games when cricket matches were in progress and did not watch the matches, while some of the members played in the matches. Due payment of entertainments duty in respect of payments by the public had been made.

The Commissioners were of opinion that so much of each member's annual subscription as exceeded 10*s.* 6*d.* was payable for privileges other than that of admission to entertainments—i.e., the cricket matches, and directed the duty to be charged on the 10*s.* 6*d.* in each case; and a demand of 103*l.* 4*s.*, the aggregate of the duties alleged to be due during the year 1919, was demanded of the club, and refused.

Sir Gordon Hewart A.-G. and *Giveen* for the Crown. This claim is made under s. 1, sub-ss. 1 and 4, of the Finance (New Duties) Act, 1916 (1), which has been amended since

(1) Finance (New Duties) Act, 1916 (6 Geo. 5, c. 11), s. 1, sub-s. 1:—"There shall .... be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an Excise duty (in this Act referred to as 'entertainments duty')...."

Sub-s. 4: "Where the payment for admission to an entertainment

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as to the amount of duty payable. It will be contended on behalf of the defendant that "club" in sub-s. 4 (1) does not include a members' club such as the present one. But no wider word could be used to describe such an unincorporated association as this, and it includes this club. It is submitted that payment of the subscription, or of part of it, was "payment for admission to an entertainment"—i.e., to the place where the entertainment is provided—within sub-s. 4 of s. 1 (1), and that the admission was "admission as a spectator" under s. 1., sub-s. 6, and that, consequently, the duty is payable.

[*Attorney-General* v. *McLeod* (2) was referred to.]

Sir W. Finlay K.C. and *A. M. Latter* for the defendant. It is admitted that these cricket matches are entertainments within the meaning of the Act. But this is a members' club. What the Act taxes is the payment made for admission to an entertainment, as a spectator. But this payment was made by the entertainers—i.e., the members—for the upkeep of their own property, for the Courts, in dealing with members' clubs, act on the principle that the members are joint owners of the club property: per Jessel M.R. in *Rigby* v. *Connol* (3), adopted by Stirling J. in *Baird* v. *Wells*. (4) The subscription is mere machinery for getting the money, which might be raised by a levy at the end of the season.

is made by means of a lump sum paid as a subscription or contribution to any club, association, or society . . . . the entertainments duty shall be paid on the amount of the lump sum, but where the Commissioners are of opinion that the payment of a lump sum . . . . represents payment for other privileges, rights or purposes besides the admission to an entertainment . . . . the duty shall be charged on such an amount as appears to the Commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable."

Sub-s. 6: "For the purpose of the provisions of this Act relating to entertainments duty—The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held. The expression 'admission' means admission as a spectator or one of an audience. . . . ."

(1) See note (1) ante, p. 683.

(2) [1918] 1 K. B. 13, 20–1.

(3) (1880) 14 Ch. D. 482, 487.

(4) (1890) 44 Ch. D. 661, 675–6.

[*Lyons & Co.* v. *Fox* (1), *Cordiner* v. *Stockham* (2) and *Graff* v. *Evans* (3) were also referred to.]

The distinction is between payment to another for an entertainment provided by him and payment for the upkeep of one's own property. Members cannot pay for admission to their own property. Sub-s. 4 of s. 1 (4) does not extend the operation of the section by saying that payment of a subscription is a payment for admission to an entertainment; it only deals with the case where in fact it is so.

[*Carlisle and Silloth Golf Club* v. *Smith* (5) was also referred to.]

Giveen in reply. The fact that the members may be joint owners of the ground does not affect the liability of the subscriptions to tax, for there is no difficulty in the conception of an owner being a spectator. And they obtain the right of being spectators by payment of the subscription, and if asked what they got for that payment must reply: "Among other things the right of admission to the matches."

[*In re New University Club* (6) was referred to.]

[He was stopped.]

ROCHE J. This case raises a question of considerable importance and general interest. The point involved is whether entertainments duty is payable under s. 1, sub-s. 1, of the Finance (New Duties) Act, 1916, in respect of the annual subscriptions paid by the members of the Essex County Cricket Club. By the above section duties are imposed on payments for admission to entertainments. "Entertainment" is defined by sub-s. 6 of s. 1 as follows: "The expression 'entertainment' includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression 'admission to an entertainment' includes admission to any place in which the entertainment is held." Sir William Finlay for the defendant has resisted the temptation to treat this as a

(1) [1919] 1 K. B. 11.
(2) [1920] 1 K. B. 104.
(3) (1882) 8 Q. B. D. 373.
(4) See note (1) ante, p. 683.
(5) [1913] 3 K. B. 75.
(6) (1887) 18 Q. B. D. 720.

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case of hardship, and has admitted that cricket is an entertainment within this definition. The other condition mentioned in the sub-section is fulfilled, because the ordinary public is admitted to this entertainment for payment, and the entertainments duty is paid by the club in respect of the members of the public who attend. I observe that, as was stated in *Attorney-General* v. *McLeod* (1), the tax is upon the privilege of watching an entertainment; therefore the Attorney-General is justified in saying that the only thing which it is now sought to tax is such a privilege. It being conceded that entertainments are held on the Essex county ground, I have to consider the text of sub-s. 4 of s. 1, which enacts: [His Lordship read it. (2)] The Commissioners, under the latter branch of the sub-section, have held that a proportion of the members' subscriptions is payable in respect of the right of admission to the matches, and have apportioned the amount. I intimated in the course of the argument that if it was decided that something was payable in respect of admission to the matches it would be necessary to quantify it in one's own mind, and the Commissioners have done so more adversely to the members than I should have done. But what I have to consider is whether any part of the subscription is paid for the right of admission to an entertainment. I am satisfied that in fact it is, and I will pass shortly to the submission of law made on behalf of the defendant. I find as a fact that the members of the club pay for admissions by a lump sum. If they were asked what they paid for, or what they got for their money, one of their answers would be: "We get the right of seeing the cricket throughout the season." Therefore, if there is no impediment in law preventing them from doing so, the Commissioners were right in saying that part of each subscription was in fact paid for the privilege of taking part as spectators in watching the matches. The submission of law is, that by paying subscriptions the subscribers became not merely members of the club, but became interested as owners in the club property, and that their subscriptions were paid for the upkeep of their

(1) [1918] 1 K. B. 13. (2) See note (1) ante, p. 683.

property, and that none of the subscribers could in these circumstances be said to be paying for the right of seeing entertainments on their own property. In support of that contention *Rigby* v. *Connol* (1) and *Baird* v. *Wells* (2) were cited. I have no reason to do otherwise than accept the principles laid down in those cases, and the same observation applies to *Graff* v. *Evans* (3), in which it was decided that the right of securing intoxicating liquor which persons obtained by becoming members of a bona fide club did not constitute the transaction of retailing intoxicating liquor, because the liquor was the property of the members. But in my judgment these cases have very little bearing upon the considerations which have to be determined in the present case. I have derived assistance from the observations in the case of *In re New University Club* (4), particularly those of Hawkins J., to which my attention was drawn by Mr. Giveen.

Ultimately, however, this case depends upon the words of sub-ss. 1 and 6 of s. 1 of the Act of 1916. (5) I do not agree with Mr. Latter's contention that the argument of the Attorney-General involves the proposition that sub-s. 4 extended the scope of the duty. Mr. Latter said that that argument amounted to a paraphrasing of the sub-section so as to make it run: "In any case where persons pay contributions to a club and are admitted to entertainments then entertainment duty is payable." The contention of the Attorney-General and the true construction of the sub-section seem to me to be this: that if in fact people pay a sum of money for admission to an entertainment, then entertainments duty is payable, notwithstanding that the payments are made in the form of subscriptions to a club. Accordingly there is nothing in law or in the sub-section to preclude this interpretation from operating in a case where subscribers do acquire some right of property, if in fact they make the payments or any part of it for the purpose and object of securing admission to an entertainment. In other words, there is nothing to

(1) 14 Ch. D. 482.
(2) 44 Ch. D. 661.
(3) 8 Q. B. D. 373.
(4) 18 Q. B. D. 720, 727–734.
(5) See note (1) ante, p. 683.

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prevent the question in this case from being a pure question of fact, and it is just because, in these cases, the question is one of fact that one meets with such difficulties as arose in *Cordiner* v. *Stockham* (1) and still more in *Lyons & Co.* v. *Fox.* (2) The difference of opinion in the latter case arose, as I read it, from a difference between the members of the Court in the interpretation of the findings of fact by the magistrate. Therefore there is nothing to prevent me from finding as a matter of fact, as I do, that part of the subscriptions of the members was paid for admission to an entertainment. I therefore give judgment in favour of the Crown.

Judgment for Crown.

Solicitor for informant: *Solicitor for Customs and Excise.*
Solicitors for defendant: *Clapham, Fraser, Cook & Co.*

W. L. L. B.

1922
March 9, 10.

LEVEY AND COMPANY *v.* GOLDBERG.

[1921. L. 1013.]

Sale of Goods—Contract required to be in Writing—Parol Variation—Postponement of Delivery at Buyer's Request—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

By a contract in writing the defendant agreed to buy from the plaintiffs certain pieces of cloth, over 10*l.* in value, to be delivered within a defined period. At the verbal request of the defendant the plaintiffs voluntarily withheld delivery during that period. The defendant subsequently refused to accept delivery, and, when sued by the plaintiffs for damages for non-acceptance, contended that there had been a parol variation of the written contract which was unenforceable by virtue of s. 4 of the Sale of Goods Act, 1893:—

Held, that the forbearance by the plaintiffs at the request of the defendant to deliver within the defined period did not constitute a variation of the contract, and therefore that the plaintiffs were entitled to maintain their action.

The principle of *Ogle* v. *Earl Vane* (1868) L. R. 3 Q. B. 272 and

(1) [1920] 1 K. B. 104. (2) [1919] 1 K. B. 11.

Hickman v. *Haynes* (1875) L. R. 10 C. P. 598 has not been affected by *Morris* v. *Baron & Co.* [1918] A. C. 1 and *Hartley* v. *Hymans* [1920] 3 K. B. 475.

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ACTION tried by McCardie J.

The plaintiffs claimed damages from the defendant for not accepting certain cloth which he had agreed to buy.

By a contract in writing dated in December, 1919, the defendant agreed to buy from the plaintiffs fifty-two pieces of cloth at 12*s.* per yard, to be delivered as to certain pieces in February or March, 1920, and the remainder between May and August, 1920. Certain pieces were delivered, but at certain interviews in August and September, 1920, between the defendant and the plaintiffs, the plaintiffs, at the verbal request of the defendant, consented to extend the time for the delivery of the bulk. Subsequently, and before delivery was made, the defendant purported to repudiate the contract, and refused to accept delivery of the bulk of the cloth.

The defendant admitted that he had refused to take delivery, and said that the plaintiffs were never ready and willing to deliver within the contract time or within a reasonable time, and he relied on s. 4 of the Sale of Goods Act, 1893.

Herbert Metcalfe (*J. B. Melville* with him) for the plaintiffs.

Cartwright Sharp for the defendant. The defendant was entitled, under the written contract, to refuse to take delivery after August 31, 1920. The plaintiffs cannot rely upon the verbal arrangement to extend the period within which delivery could be made, as *Morris* v. *Baron & Co.* (1) makes it quite clear that a contract for the sale of goods of at least 10*l.* in value, evidenced by writing, cannot be varied by an oral agreement. The verbal agreement set up by the plaintiffs is a variation of the written agreement and is unenforceable by virtue of s. 4 of the Sale of Goods Act, 1893. If the plaintiffs' case is founded upon waiver, *Hartley* v. *Hymans* (2) shows that in a case like this the waiver must

(1) [1918] A. C. 1. (2) [1920] 3 K. B. 475.

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be evidenced by writing. Here there was merely a verbal waiver.

Metcalfe in reply. This case is governed by *Hickman* v. *Haynes* (1), where it was held, applying the principle laid down in *Ogle* v. *Earl Vane* (2), that where a seller voluntarily withheld delivery at the verbal request of the buyer, no new contract being substituted for the original written contract, the seller was entitled to maintain his action for non-acceptance of the goods by the buyer in accordance with the terms of the written contract. The principle of that case is unaffected by *Morris* v. *Baron & Co.* (3) and *Hartley* v. *Hymans.* (4)

MCCARDIE J. stated the facts and continued: Mr. Cartwright Sharp for the defendant contended that there had been a parol variation of the written bargain between the parties, which variation, he said, was, by the terms of s. 4 of the Sale of Goods Act, 1893, unenforceable. In support of this contention he referred to *Morris* v. *Baron & Co.* (3), where the authorities are reviewed. That decision and the earlier ones there cited make it quite plain that a contract required by s. 4 of the Sale of Goods Act, 1893, to be in writing, cannot be varied by word of mouth. I ventured to emphasise that point in *Hartley* v. *Hymans.* (4) If this were a case of waiver amounting to a variation of the contract it might well be, as I there indicated, that the waiver would have to be evidenced by writing. In *Hartley* v. *Hymans* (4) the waiver was in fact evidenced by writing. But a variation of a contract is a definite change of contractual obligations and is in my view wholly distinct from the doctrine of forbearance which is as extant to-day as before *Morris* v. *Baron & Co.* (3) and *Hartley* v. *Hymans.* (4) That principle of forbearance was first indicated in *Ogle* v. *Earl Vane.* (2) In that case the defendant had failed to deliver certain iron by the contract date, and the plaintiff abstained, because of a request by the defendant, from buying against him at that

(1) L. R. 10 C. P. 598.
(2) L. R. 3 Q. B. 272.
(3) [1918] A. C. 1.
(4) [1920] 3 K. B. 475.

date. The question was as to the measure of damages, and the essence of the decision was that, inasmuch as the plaintiff had abstained at the defendant's request from buying against him at the correct date and had waited till a later date because of that request, the plaintiff was entitled to assess his damages as at the later date and was not bound by the limitations of the earlier date. But the doctrine of forbearance as relevant to the sale of goods is illustrated most conspicuously by *Hickman* v. *Haynes*. (1) There the plaintiff had agreed to deliver and the defendants to accept certain iron in June. In that month one of the defendants saw the plaintiff and requested him to allow the delivery to stand over, and the plaintiff verbally consented. On August 1 the plaintiff pressed the defendants to take delivery, and the defendants, after some correspondence, wrote on August 9 asking for further time. The plaintiff again waited, but without result, and it was not until October that the plaintiff brought his action for non-acceptance of the goods in accordance with the terms of the original contract. It was held that the true effect of what took place between the parties was that the plaintiff voluntarily withheld delivery at the request of the defendants, and as no new contract was substituted for the original written contract the plaintiff was entitled to maintain his action. It was further held, and in this respect *Ogle* v. *Earl Vane* (2) was adopted, that the damages must be estimated according to the market price of iron at a reasonable time after the last request of the defendants to withhold delivery.

I desire to express my view that this principle, which I will call the *Ogle* v. *Earl Vane* (2) and *Hickman* v. *Haynes* (1) principle, is wholly unaffected by the decision of the House of Lords in *Morris* v. *Baron & Co.* (3), or by anything I said in *Hartley* v. *Hymans*. (4) In the present case I hold that the plaintiffs had till the end of August to deliver and that they voluntarily abstained from delivering in August at the request of the defendant. The defendant therefore cannot

(1) L. R. 10 C. P. 598.
(2) L. R. 3 Q. B. 272.
(3) [1918] A. C. 1.
(4) [1920] 3 K. B. 475.

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McCardie J.

rely upon the omission to tender delivery within that period. That concludes the case in favour of the plaintiffs.

Mr. Cartwright Sharp suggested that the plaintiffs were not ready and willing to deliver during August. The plaintiffs were not bound actually to tender delivery; it was sufficient if they were ready and willing to deliver. That principle is amply established by *Jackson* v. *Allaway* (1) and *Baker* v. *Firminger*. (2) The question of readiness and willingness is substantially a question of fact. If the defendant had desired delivery in August I entertain no doubt that the plaintiffs could have secured delivery from their manufacturers without the slightest difficulty. I find that the plaintiffs were always ready and willing to carry out their bargain, and I assess their damages at 1150*l*.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Gisborne, Woodhouse & Co., for Carr & Sandelson, Leeds.*

Solicitors for defendant: *Edmond O'Connor & Co.*

(1) (1844) 6 Man. & G. 942. (2) (1859) 28 L. J. (Ex.) 130.

J. S. H.

DENNIS *v.* HUTCHINSON.

1922
Jan. 17, 18.

TRAFFORD *v.* THE SAME.

Shop—Keeping open after closing Hour—Playing mechanical Games of Chance or Skill—Business of amusement Caterer—"Shop"—"Premises where any retail trade or business is carried on"—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *s.* 19, *sub-s.* 1—*Shops* (*Early Closing*) *Act*, 1920 (10 *& 11 Geo.* 5, *c.* 58), *Schedule, Part I., paras.* 1 (*a*), 4.

The appellants had each a wooden booth or stall containing mechanical contrivances whereby games of mixed chance and skill were played by members of the public on payment of an entrance fee for prizes of chocolates, etc., provided by the appellants. No other business was carried on at these stalls:—

Held, that neither of the above stalls was a "shop" within the meaning of s. 19, sub-s. 1, of the Shops Act, 1912, as being "premises where any retail trade or business is carried on," and that, consequently, the appellants had not committed the offence of keeping a "shop" open after the closing hour prescribed by para. 1 (*a*) of Part I. of the Schedule to the Shops (Early Closing) Act, 1920, as amended by subsequent orders, which by para. 4 incorporates the above definition of "shop."

CASE stated by Justices of the Lindsey Division of Spilsby, Lincolnshire.

At a Court of summary jurisdiction sitting on August 2, 1921, at Skegness, informations were preferred by the respondent, Joseph Hutchinson, an inspector of police, against the appellants George Alfred Dennis and George Trafford for that each respectively "on the 16th day of July, 1921, at the parish of Skegness aforesaid was the occupier of a shop there which was not closed for the serving of customers not later than nine o'clock in the evening," contrary to the provisions of the Shops (Early Closing) Act, 1920 (10 & 11 Geo. 5, c. 58). The following facts were proved or admitted.

The appellant Dennis occupied a site or pitch upon the beach at Skegness upon which he had erected a wooden building or stall whereon was a mechanical contrivance whereby a game called "Slippery Bears" was played. There were twelve poles, each having a Teddy bear at the bottom which was made to move up the pole by turning a handle. The competitor who first succeeded in getting his

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bear to the top of the pole was declared to be the winner and was given a prize of chocolates or cigarettes. Each competitor had to pay an entrance fee of 3*d.*, but only the winner received a prize, the value of which was far below the total of the amount received from the competitors. The chocolates and cigarettes were displayed on the stall, and the winners selected their own prizes. The appellant carried on no other trade or business at the stall. A police constable who gave evidence saw the above game played after shop-closing hours under the above conditions. He did not attempt to buy direct any of the above chocolates or cigarettes nor did he see any one else do so.

For the respondent it was contended that the said stall or building was a "shop" within the meaning of para. 1 (*a*) of the Schedule to the Shops (Early Closing) Act, 1920. By para. 4 "shop" and "retail trade or business" have the same meaning respectively as in the Shops Act, 1912 (2 Geo. 5, c. 3). By s. 19, sub-s. 1, of the latter Act: "The expression 'shop' includes any premises where any retail trade or business is carried on" and "The expression 'retail trade or business' includes the business of a barber or hairdresser, the sale of refreshments or intoxicating liquors, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement."

The justices were of opinion that the stall or building was a "shop" within the Act of 1920, that the appellant was the occupier thereof, that it was not closed for the serving of customers not later than 9 o'clock in the evening within the meaning of para. 1 (*a*) of the Act of 1920, as amended (as to closing hour) and, subject to this case, convicted the appellant.

In the case against George Trafford the facts, except as to the game played, were the same. In his case a number of balls contained in a tub were blown up a spout by means of bellows. Each competitor paid 2*d.* and was handed a net with which he endeavoured to catch the balls as they were blown out of the spout, and the competitor who first

caught three of these balls was declared to be the winner, and received as prize, chocolates, cigarettes or sweets, none of the unsuccessful competitors receiving anything, the value of the prize being far less than the total amount received from the competitors.

The justices, subject to this case, convicted Trafford for the same reasons as in the case of Dennis.

Sandlands for the appellant. The decision of the justices n each of the cases was wrong, and in neither was the stall or booth in question a "shop" within the meaning of the Shops (Early Closing) Act, 1920, which incorporates the definition of that word in s. 19, sub-s. 1, of the Shops Act, 1912—namely, "any premises where any retail trade or business is carried on." These stalls were places of amusement, not shops, and no retail trade or business was carried on at them. The ordinary and popular meaning of "shop" is quite inapplicable to them, and it is significant that the definition of "shop" in the Act of 1912 does not include stalls, as did the interpretation section, s. 9, of the Shop Hours Act, 1892 (55 & 56 Vict. c. 62). This question does not appear to have been decided. In *Ward* v. *W. H. Smith & Son* (1) the question whether a railway bookstall was a shop within the Act of 1912 was raised but not determined. In *Pope* v. *Whalley* (2) a wooden stall was held not to be a "shop" within s. 13 of The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14), and that case is closely analogous to the present one.

Norman Birkett for the respondent. These stalls were shops within the meaning of the definition in s. 19, sub-s. 1, of the Act of 1912, which says that shop "includes" premises where any retail trade or business is carried on, which implies that it means something more. It clearly does not limit its meaning to premises where a retail trade or business is carried on, and does not exclude a place merely because a retail trade or business is not carried on. In *Ward* v. *W. H. Smith & Son* (1) a railway bookstall was assumed to be a

(1) [1913] 3 K. B. 154. (2) (1865) 6 B. & S. 303.

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shop within the Act of 1912. *Wallace* v. *Dixon* (1) shows that "shop" in that Act has an artificial meaning: see the judgment of Pim J. (2) Trade does not necessarily involve a sale, and the definition of "shop assistant" in s. 19, sub-s. 1, of the Act of 1912 only refers to his connection "with the serving of customers." An amusement caterer carries on a trade or business, and "retail" merely means "on a small scale." Para. 3 of Part I. of the Schedule to the Act of 1920, which takes fairs and charitable bazaars out of the operation of the Act, would seem to contemplate business transactions in places which cannot properly be called shops.

Sandlands in reply. A shop is a place where a retail trade is carried on: *Reg.* v. *Chapman* (3) per Tindal C.J.; and where goods are stored for sale: per Mellor J. in *Pope* v. *Whalley*. (4) In *Harris* v. *Amery* (5) Willes J. said (6): "trade . . . . has the technical meaning of buying and selling."

[*Palmer* v. *Snow* (7) and *Coombs* v. *Cook* (8) were also referred to.]

[He was stopped.]

LORD TREVETHIN C.J. This case raises a question under the Shops Act, 1912, and the Shops (Early Closing) Act, 1920. Para. 1 (*a*) of Part I. of the Schedule to the latter Act, as amended by subsequent Orders, provides that: "Every shop shall be closed for the serving of customers not later than [9] o'clock in the evening." By para. 4 we are referred to the Shops Act, 1912, for a definition of "shop." [His Lordship read s. 19, sub-s. 1.] The facts as to the character of the stalls were the same in both cases, except as to the nature of the game played, which is not material, and I need deal only with those in the case of Dennis. [His Lordship stated them.] The justices found that these premises were a shop within the meaning of that definition. The question is

(1) [1917] 2 I. R. 236.
(2) Ibid. 247.
(3) (1843) 7 J. P. 132.
(4) 6 B. & S. 303, 313.
(5) (1865) L. R. 1 C. P. 148; 35 L. J. (C. P.) 89.
(6) 35 L. J. (C. P.) 92.
(7) [1900] 1 Q. B. 725.
(8) (1883) Cab. & Ell. 75, 77.

whether they were a shop. The justices do not give us reasons for their conclusion.

To my mind the argument for the appellants is convincing, and I do not think this place was a shop. It is true it was a structure capable of being used as a shop, but there was no sale or retail trade or business carried on there.

There was the business of an amusement caterer being carried on there, but being an amusement caterer is not being a shopkeeper, and I see no difference, except for its humble character, between this stall and a theatre. It is true that the theatre proprietor does not give prizes, but he caters for amusement. Prima facie a shop is a place where goods are sold by retail and stored for sale; it is not a place where something in the nature of gambling takes place. In the Irish case of *Wallace* v. *Dixon*, Pim J., dealing with s. 19 of the Shops Act, 1912, said (1): "In the first clause of s. 19 (the interpretation section) the word used is 'includes' and not 'means.' This is not a natural use of the word 'include,' and, so far as this Court is concerned, the word 'mean' would have been of equal force. Why has it been used? It seems to me to point to the fact that the Legislature meant to give an extended and unnatural meaning to the word 'shop,' a meaning that went far beyond the popular and recognized meaning of the word." I cannot agree that that is so; the clause would have been plainer had the word used been "means" instead of "includes." But the next clause in some degree explains its use, for it says that "The expression 'retail trade or business' includes the business of a barber or hairdresser," which explanation was necessary, because neither a barber nor a hairdresser need as such carry on a retail trade or business. I think "trade or business" signifies buying and selling—see Willes J. in *Harris* v. *Amery*. (2) The present case, in my opinion, is not within the Act, and this stall or booth is not a shop in which the appellants carry on a retail trade or business. Therefore the justices were wrong and the appeal must be allowed.

(1) [1917] 2 I. R. 236, 247.

(2) 35 L. J. (C. P.) 92.

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AVORY J. I am of the same opinion. The only difficulty I have felt arises from the use in s. 19 of the Act of 1912, the interpretation clause, of the word "includes." No doubt the ordinary meaning of such a clause is that the word to be interpreted is to have its natural meaning and also an extended meaning. But even if that principle of interpretation be applied, Mr. Birkett for the respondent has not satisfied me that the word "shop" in its natural and ordinary meaning should be extended to cover this particular structure.

The only case which in any way supports the decision of the justices is the Irish case of *Wallace* v. *Dixon* (1), where in addition to the passage cited by my Lord from the judgment of Pim J. (2), Madden J., after quoting s. 19 of the Act of 1912, says (3): "The real question for our determination is the meaning to be attributed to the word 'retail.' I am of opinion that the word 'retail' is used in this section in contradistinction to 'wholesale,' and that every business in which a business is carried on which is 'retail' in this sense of the word is a 'shop' within the meaning of the Act." It seems to be quite clear that the ordinary dictionary meaning of "shop" is a place where ordinary retail selling and the serving of customers takes place, and that the distinction between *Wallace* v. *Dixon* (1) and the present case is, that although in the former case no goods were stored on the premises, goods were bought and sold thereon by retail and customers were served. Therefore the Court held that the attendant who took orders was a shop assistant, and that a retail business was carried on. It is to be observed, in construing any word in an Act of Parliament, that unless there is a precise definition it is always necessary to look at the object of the Act, and looking at the Act of 1912 we find that the first three sections are concerned with conditions of employment. The next group of sections (4 to 12) relate to the closing of shops. When one turns to the definition of "shop assistant" in s. 19, we find that it means "any person wholly or mainly employed

(1) [1917] 2 I. R. 236. (2) Ibid. 247.
(3) Ibid. 244.

in a shop in connexion with the serving of customers or the receipt of orders or the despatch of goods." Looking at that definition it seems clear that the persons employed at the place now in question were not shop assistants, and it cannot be said that customers were served there. Looking further in the same section at the interpretation of retail trade or business, which "includes the business of a barber or hairdresser, the sale of refreshments or intoxicating liquors, and retail sales by auction, but does not include the sale of programmes and catalogues and other similar sales at theatres and places of amusement," I come to the conclusion that the Legislature intended to exclude from the operation of the statute a place of amusement like the one in question.

ROCHE J. I agree.

Appeals allowed.

Solicitors for appellants: *Miller & Smiths, for Clitherow & Son, Horncastle.*

Solicitors for respondent: *Taylor, Jelf & Thomas, for Thimbleby & Son, Spilsby.*

W. L. L. B.

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Feb. 10, 21.

TOWNSEND *v.* CHARLTON.

Emergency Legislation—Landlord and Tenant—Distress for Rent—Application to Court—Discretion to defer or rescind Order—Extent of Discretion—Grounds other than Inability to pay by Reason of the War—Courts (Emergency Powers) Act, 1914 (4 *& 5 Geo. 5, c.* 78), *s.* 1, *sub-s.* 1 (*b*); *sub-s.* 2—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *& 11 Geo. 5, c.* 17), *s.* 5, *sub-s.* 2; *s.* 6—*Increase of Rent, &c., Rules*, 1920, *rr.* 1, 4, 7, 8, 14, 17, 18.

Where an application is made to the Court under the Courts (Emergency Powers) Acts, 1914 to 1917, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by the landlord of premises to which the latter Act applies, for leave to levy a distress for rent, the discretion of the Court to grant or refuse the application is not limited to the question that arises under s. 1, sub-s. 2, of the Act of 1914—namely, whether the tenant is unable immediately to make the payment by reason of circumstances attributable to the war, but extends to, and may and should be exercised only after due inquiry into, any other question that may have been raised under s. 6 of the Act of 1920, such for example as the question whether the rent sought to be distrained for is due and payable by the tenant.

Appeal from Nottingham County Court.

The appellant, Alfred Townsend, was the tenant, and the respondent, Henry Charlton, was the landlord of premises at Old Chiswell, Nottingham, to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied.

A summons dated October 19, 1921, intituled in the matter of the Courts (Emergency Powers) Acts, 1914 to 1917, and also in the matter of the Increase of Rent, &c. (Restrictions), Act, 1920 (1), was served upon the tenant to attend before

(1) The Courts (Emergency Powers) Act, 1914, provides: Sect. 1. "(1.) . . . . no person shall . . . . (*b*) levy any distress . . . . except after such application to such court and such notice as may be provided for by rules or directions under this Act. . . . .

"(2.) If, on any such application, the court to which the application is made is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable directly or indirectly to the present war, the Court may in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order, defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the Court thinks fit."

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920,

the Registrar of the county court on an application by the landlord for leave to levy a distress for rent amounting to 20*l.* 17*s.* 1*d.*, alleged by the landlord to be due to him from the tenant. On November 3, 1921, on the hearing of the summons, the Registrar made an order granting the application. On November 16, 1921, the deputy county court judge, on being asked to rescind the order of the Registrar, referred the case back to the latter for rehearing. On November 22, 1921, the Registrar reheard the case and again made an order granting the application.

On December 6, 1921, the deputy county court judge was again asked on behalf of the tenant to rescind the order of the Registrar and the leave given by the latter. The tenant was then represented by a solicitor, and he admitted on the tenant's behalf that the tenant was under no inability to pay the amount claimed by the landlord as rent by reason of circumstances directly or indirectly attributable to the late war; but he sought and claimed the right, which had been refused to him at the hearing, of showing, as a ground for asking that the leave to distrain given by the Registrar

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provides: Sect. 5. "(2.) At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any such dwelling-house [i.e., any dwelling-house to which the Act applies], or for the ejectment of a tenant therefrom, or in the case of any such order or judgment which has been made or given, whether before or after the passing of this Act, and not executed, at any subsequent time, the Court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession, for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the Court thinks fit, and, if such conditions are complied with, the Court may, if it thinks fit, discharge or rescind any such order or judgment."

Sect. 6. "No distress for the rent of any dwelling-house to which this Act applies shall be levied except with the leave of the county court, and the Court shall, with respect to any application for such leave, have the same or similar powers with respect to adjournment, stay, suspension, postponement and otherwise as are conferred by the last preceding section of this Act in relation to applications for the recovery of possession. . . . . The provisions of this section shall be in addition to and not in derogation of any of the provisions of the Courts (Emergency Powers) Act, 1914, or any Act amending or extending the same, except so far as those provisions are repealed by this Act."

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should be rescinded, that there was a reasonable and bona fide dispute whether the rent due from the tenant or payable by him to the landlord was the amount for which the landlord asked leave to distrain, or a much smaller sum, namely, 5*l.* 14*s.* 6*d.*, and no more, which had been tendered to the landlord before the application for leave to distrain had been made to the Registrar. He offered evidence and proposed to advance arguments to show that the only amount due or payable as rent from the tenant to the landlord was the sum of 5*l.* 14*s.* 6*d.*, and therefore that leave ought not to be given to levy a distress for 20*l.* 17*s.* 1*d.* His contention was based upon and arose under the provisions of the Increase of Rent, &c. (Restrictions), Act, 1920.

The deputy county court judge held that the matter before him was concluded by the admission that there was no inability on the part of the tenant to pay the amount for which leave to distrain was asked, and he accordingly declined to hear anything upon, or to give any consideration to, the contentions raised by the tenant's solicitor, stating, as appeared upon his note, that the case was an ordinary case of landlord and tenant, and he therefore refused to rescind the order of and leave given by the Registrar.

The tenant appealed.

H. St. John Field for the tenant, appellant.

H. C. Davenport for the landlord, respondent.

[The arguments of counsel and the provisions of the above-mentioned Acts and of the rules thereunder referred to by them sufficiently appear from the judgment of the Court.]

Feb. 21. SWIFT J. The judgment of the Court will be read by Mr. Justice Acton.

ACTON J. read the judgment of the Court, which after setting forth the facts substantially as above stated, continued as follows: In the arguments before this Court the material sections of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the Courts (Emergency Powers) Acts, 1914 to 1917, and the rules and forms

thereunder were elaborately discussed. (Increase of Rent, &c. (Restrictions), Act, 1920, s. 2, sub-ss. 1, 2 and 3; s. 5, sub-s. 2; s. 6 [His Lordship read this section]; Increase of Rent, &c., Rules, 1920, rr. 1, 4, 7, 8, 13, 14, 17, 18; Courts (Emergency Powers) Act, 1914, s. 1, sub-s. 1 (*b*); sub-s. 2; Consolidated County Courts (Emergency Powers) Rules, 1918, rr. 1, 2, 20; and the prescribed forms under each of these Acts.)

Upon consideration of these Acts, rules, and forms, we are of opinion that the decision of the learned deputy judge was wrong. The application for leave to levy a distress for rent in this case was an application not only under s. 1, sub-ss. 1 (*b*) and 2, of the Courts (Emergency Powers) Act, 1914, but also under s. 6 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Upon such an application the discretion to be exercised as to leave to levy distress is, in our opinion, not limited to the question whether there is or is not on the part of the tenant an inability to pay the amount alleged to be due as rent attributable directly or indirectly to the war, but such discretion may and should be exercised only after due inquiry into questions such as those which the learned deputy judge was invited to inquire into and consider in the present case. How, in each case, after such inquiry and consideration, the discretion is to be exercised, must of course still be a question of discretion, to be judicially exercised. Sect. 6 of the Increase of Rent, &c. (Restrictions), Act, 1920, in conjunction with s. 5, sub-s. 2, of that Act, affords the fullest possible opportunities for the exercise of such discretion; nor in order that it should be exercised is it in any way necessary that any decision should then be arrived at as to the amount of rent due or payable. In an application under s. 6 of the Act of 1920, a tenant should be admitted to show, if he can, that there is a reasonable and bona fide dispute as to the amount of rent due or payable, and if he shows this such order as may be appropriate to the circumstances of each particular case should be made upon such terms and conditions as may be thought fit.

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Acton J.

The learned deputy judge, as has already been stated, as one of the grounds for his decision expressed the view that this was "an ordinary case of landlord and tenant." With deference to him, that appears to us to be precisely what it is not. Counsel for the landlord followed up and elaborated this view by arguing that it was not the intention of the Legislature that by s. 6 of the Act of 1920 the landlord's right of distress should be restricted, and that to decide this case as we are deciding it would be to restrict that right materially. This argument also appears to us to be unsound. In an ordinary case of landlord and tenant the amount of rent for which a distress may be levied (apart from statutory restrictions as regards arrears) is dependent upon the terms of the reddendum and, unless a tenant is to pay a rent certain, the landlord has no right to distrain. Under the Act of 1920 the rent payable depends not merely upon agreement between landlord and tenant, but also upon the application to the circumstances of each particular case of complex and difficult statutory enactments; and even when this has been done, the rent thereby arrived at as payable is not payable unless certain conditions precedent to the tenant's liability to pay and the landlord's right to enforce payment have been fulfilled. In the present case it was, as we understand, contended for the tenant that upon the application of these complex and difficult statutory enactments, a very large amount of the rent claimed could in no event be due from the tenant at all, and also that, even if it would otherwise have been payable, statutory conditions precedent to the tenant's liability to pay it had not been fulfilled. These are matters which give rise to considerations which are quite inapplicable to "an ordinary case of landlord and tenant," and to hold that on an application for leave to distrain under s. 6 of the Act of 1920, the Court is not bound to grant leave without due regard to these matters appears to us to impose no restriction upon the landlord's right to distrain as it stood, in the case of tenancies to which the Increase of Rent Acts have applied, before those Acts came into operation, or as it still stands in the case of those tenancies to which those

Acts have had no application. It seems to us that it would be to stultify the functions of a Court of justice if it were held that that Court is bound, without any inquiry or consideration as to these matters, to give leave to levy a distress for an amount of rent which the same Court might subsequently be obliged to determine upon inquiry and consideration was by the operation of the Act of 1920 never due from or payable by the tenant at all.

It was also contended that the object of s. 6 of the Act of 1920 was merely to provide for a continuance in the case of tenancies of houses to which that Act applies of the protection afforded by the Courts Emergency Powers Act beyond the period to which that protection would otherwise extend, that is to say, for one year after the termination of the war: and that there was nothing in the Increase of Rent, &c. (Restriction), Act, 1920, to direct or enable the Court to consider anything except inability to pay directly or indirectly attributable to the war. It follows from what has already been said that this contention cannot in our opinion be sustained.

It was also said that the practice adopted in several county courts was controlled by and in conformity with the contentions unsuccessfully advanced before us on behalf of the landlord in the present case. If this be so, we are of opinion that the practice is erroneous in principle and should be abandoned.

For these reasons this appeal must be allowed and the case must be remitted to the judge of the Nottingham County Court to be dealt with in accordance with the law as we have expressed it in this judgment.

Appeal allowed.

Solicitors for appellant: *Clinton & Co., for Day & Johnson, Nottingham.*

Solicitors for respondent: *Corbin, Greener & Cook, for Huntsman & Donaldson, Nottingham.*

J. R.

K. B. D.
1921
Nov. 11.

C. A.
1922
March 7.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

In re An Arbitration between the PENINSULAR AND ORIENTAL BRANCH SERVICE and the COMMONWEALTH SHIPPING REPRESENTATIVE.

Shipping—Collision—Requisition by Commonwealth Government—Sailing without Lights under Admiralty Instructions—Loss of Ship—Colliding Vessel carrying Ambulance Wagons from one War Base to Another—Warlike Operations—Liability of Commonwealth Government.

The steamship *Geelong* was requisitioned by the Commonwealth Government of Australia in April, 1915, upon the terms that the Australian Government accepted full war risks, but that the owners took all ordinary sea risks which could be covered by an ordinary policy of insurance. On January 1, 1916, the *Geelong*, while proceeding from Port Said to Gibraltar for orders, came into collision with the steamship *Bonvilston* and was totally lost. The *Bonvilston*, which was also under requisition, was at the time of the collision carrying ambulance wagons and other Government stores from one war base, Mudros, to another war base, Alexandria. Both steamships were at the time of the collision proceeding at night at full speed without lights in accordance with Admiralty instructions. The collision occurred without any negligence on the part of either vessel. The owners of the *Geelong* claimed her value from the Australian Government, contending that she had been lost by a war risk. Bailhache J. held, reversing the decision of the arbitrator, that the *Bonvilston* was at the time of the collision engaged in a warlike operation and that therefore the loss of the *Geelong* was due to a war risk and not to a marine risk. On appeal by the Australian Government:—

Held, by the Court of Appeal, that having regard to the fact that the evacuation of Gallipoli was proceeding on January 1, 1916, of which fact the Court took judicial notice, the *Bonvilston* in carrying ambulance wagons from Mudros to Alexandria was engaged in a warlike operation at the time she came into collision with the *Geelong*, and that therefore the *Geelong* was lost by a war risk.

Held, further, by Scrutton L.J. that the carrying of ambulance wagons and other Government stores from one war base to another in time of war is a warlike operation.

Appeal from an award of an arbitrator stated in the form of a special case under s. 7 of the Arbitration Act, 1889, in an arbitration between the Peninsular and Oriental Branch Service, London (claimants), and the Commonwealth Shipping Representative, representing the Government of the Commonwealth of Australia.

The facts as found by the arbitrator were as follows :—

1. On or about April 17, 1915, the *Geelong* belonging to the claimants was requisitioned and taken for use by the Australian Government for transport purposes in connection with the war.

2. The terms of requisition provided (inter alia) as follows :—

"The Commonwealth Government accepts full war risks and will indemnify owners against any claim arising from the requisition in this connection, but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace."

3. It was agreed before the arbitrator, and the case was argued on the basis, that the effect of the foregoing clause was to make the Australian Government responsible only for such risks of war as would be excluded from an ordinary marine policy by the presence therein of the usual f.c. and s. warranty, including in such warranty all consequences of hostilities or warlike operations.

4. On January 1, 1916, the *Geelong*, whilst under requisition as aforesaid, collided with the British steamship *Bonvilston* in the Eastern Mediterranean, and as a result of such collision was sunk and totally lost.

5. At the time of the said collision the *Geelong* was bound from Port Said to Gibraltar for orders. She had come from Australia via the Suez Canal and had discharged some troops at Suez. She was laden at the time of the collision with a part cargo of general goods, laden on Government account, in accordance with a term of the requisition whereby cargo might be carried for stability purposes and the profitable utilisation of such space as might not be required to accommodate troops, horses, stores, etc., the freight received by the owners for the carriage of such cargo to be credited to the Commonwealth Government.

6. At the time in question the Mediterranean was the scene of considerable activity on the part of enemy submarines, and the *Geelong* was being navigated in accordance with confidential instructions received from the naval

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authorities at Port Said, with a view of minimising the risk of submarine attack. These instructions prescribed the courses to be followed, and in addition provided that the vessel was, at night, to be navigated at best speed continuously and without showing any lights.

7. The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria). In accordance with the orders of the naval authorities given for the purpose of minimising the risk of submarine attack she was steaming at her best speed and was showing no lights.

8. The collision occurred about 7.25 P.M. on January 1, 1916, in approximately lat. 32° 46′ N., long. 30° 5′ E., the vessels being in fact on crossing courses, with the *Bonvilston* on the starboard side of the *Geelong*.

9. In an action in the Admiralty Division between the claimants and the owners of the *Bonvilston* arising out of the collision Sir Samuel Evans P. held that in the circumstances there was no negligence in the navigation of either vessel. This finding was not disputed before the arbitrator, and accordingly he found that the said collision occurred without negligence on the part of either vessel, and was solely due to the fact that both vessels were navigating at night, under naval orders, at full speed and without lights.

10. The claimants contended :—

(*a*) That the service upon which each of the said steamers was engaged at the time of the collision was of a warlike character, or at any rate that the *Bonvilston* was engaged on a service of a warlike character, and that the operation of navigating on such service was a "warlike operation."

(*b*) That, given a warlike operation, and the combination of circumstances causing the loss being unimaginable without the war, the loss was the consequence of hostilities or warlike operations.

11. The Australian Government contended that the loss

of the *Geelong* was caused by a marine peril—namely, collision—and not by any consequence of hostilities or warlike operations.

12. In so far as it was a question of fact the arbitrator found, and in so far as it was a question of law (and in such case subject to the opinion of the Court) the arbitrator held that the loss of the *Geelong* was caused by a marine peril and not by a war peril.

13. The arbitrator accordingly awarded subject to the opinion of the Court that the Australian Government were under no liability to the claimants in respect of the loss.

14. The question for the opinion of the Court was whether the arbitrator was right in holding that the loss of the *Geelong* was, in the circumstances hereinbefore stated, caused by a marine peril and not by a war peril.

15. If the Court should answer this question in the affirmative, the award in para. 13 hereof was to stand. If the Court should answer the question in the negative then the arbitrator awarded that the claimants were entitled to be indemnified by the Australian Government in respect of the loss of the *Geelong*.

MacKinnon K.C. and *G. P. Langton* for the claimants.

R. A. Wright K.C. and *Claughton Scott* for the Australian Government.

BAILHACHE J. In this case the question is whether the *Geelong*, which was lost in collision with another steamer known as the *Bonvilston*, was lost by a war risk or a marine risk. The case is stated by an arbitrator who found that the loss was due to a marine peril and not to a war peril. It was found in an action in the Admiralty Court that there was no negligence in the navigation of either vessel. I should have thought that the whole of this ground had been covered in the several cases in which this question has already been before the Courts, but it looks as though this case was not absolutely covered by authority. The *Geelong* had only general goods on board. It is true that they were Government

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goods and that she was requisitioned by the Australian Government and had carried troops from Australia which she had discharged at Suez. She had no troops on board at the time of the collision and was not at that time engaged in any warlike operation. The collision between the *Geelong* and the *Bonvilston* took place in the Mediterranean at a place where there was a good deal of submarine activity. The *Geelong* was sailing at night without lights going full speed, but the mere fact that she was sailing without lights and going full speed ahead in the dark in obedience to the Admiralty orders would not in itself make her engaged in a warlike operation, or make a collision with her a war risk. The *Bonvilston* was proceeding from Mudros to Alexandria carrying ambulance wagons and other stores from one war base to another. She, too, was proceeding without lights and full speed ahead. Now in my opinion a vessel engaged as the *Bonvilston* was in carrying Government stores and ambulance wagons from one war base to another war base is engaged in a warlike operation. That seems to me to be Lord Atkinson's opinion in the House of Lords in the *Petersham Case* (1) when dealing with the *St. Oswald's Case* (2) where he says: "In that case the vessel which was lost was requisitioned by the Admiralty and bound to obey the orders given through its accredited officers. She was, at the time of her loss, employed in obedience to these orders on a service which was in its own nature a 'warlike operation'—namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. It is true that at the time of her collision with the French battleship, the *Suffren*, she had not got these troops on board, but she was, under Admiralty orders, hurrying at full speed to the port at which she was to take them on board. This circumstance does not, in my view, alter the character of the operation she was at the time of collision performing." Now if it be a warlike operation to take troops from one place to another, I am unable to see myself that it is not equally a warlike operation to convey munitions

(1) [1921] 1 A. C. 99, 116. (2) [1918] 2 K. B. 879.

of war or ambulance wagons for the use of wounded soldiers from one place to another. It is very much a case of first impression, although one, of course, bears in mind the numerous cases which have been decided upon what is a war risk and what is a marine risk. I do not think this case is quite covered by authority; the nearest approach to authority seems to be the passage that I have cited from Lord Atkinson's judgment in the House of Lords. In my opinion the *Bonvilston* was engaged in a warlike operation, and that the collision between her and the *Geelong* while they were both of them steaming at night full speed ahead without lights was the consequence of a war risk and not of a marine risk. The alternative award in clause 15 of the award therefore stands.

R. F. S.

The Australian Government appealed. The appeal was heard on March 7, 1922.

R. A. Wright K.C. and *Claughton Scott* for the appellants. The decision of the Court below was not in accordance with the recent decisions of the House of Lords.

The question is whether the carrying of ambulance wagons and stores turned a merchant vessel into a ship engaged in warlike operations. It is submitted that the *Bonvilston* was a merchant ship, and that it is absurd to say that she was engaged on a warlike operation. The arbitrator found that she was not so engaged, and it is for the respondents to displace that finding. Prima facie a merchant vessel is not engaged on a warlike operation. Prima facie a warship is. A troopship is like an army on the march.

As indicating the principles to be applied see *Britain Steamship Co.* v. *The King.* (1) In that case a steamship while on a voyage with a cargo of iron ore, was lost at night by collision with another ship also carrying cargo when both were, in compliance with Admiralty regulations, being navigated without lights, and it was held that there were no

(1) [1921] 1 A. C. 99.

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warlike operations of which the loss of the ship could be said to be a consequence. Viscount Cave there said (1) that in order to establish that a collision was a consequence of hostilities or warlike operations it was necessary to show "first that there were hostilities or warlike operations which could have caused the collision; and, secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations": see also per Lord Sumner (2) and per Lord Wrenbury. (3)

The case is different where the ship causing the collision is a warship: *Attorney-General* v. *Ard Coasters.* (4) In *Harrisons, Ld.* v. *Shipping Controller* (5) the only material point was as to the nature of the cargo. It was there held that the presence of a few soldiers aboard, whether wounded or unwounded, would not turn a merchantman into a transport or change an otherwise peaceful voyage into a warlike undertaking.

The question here is primarily one of fact and should be decided as it was decided by the arbitrator.

[They also referred to *Atlantic Transport Co.* v. *Director of Transports.* (6)]

Sir John Simon K.C., *MacKinnon K.C.* and *G. P. Langton* for the respondents. It is submitted that the decision of Bailhache J. was right if the view expressed by Lord Atkinson in the *Petersham Case* (7) when dealing with the *St. Oswald's Case* be accepted. The collision in this case must be regarded as due to a war risk, because one of the vessels was engaged in evacuating troops from Gallipoli.

Navigating without lights is not sufficient in itself to make the risk a war risk. But when, as here, one of the colliding ships is a warship that is sufficient to make the risk a war risk. It is fairly clear that a merchant vessel whilst engaged in carrying warlike stores is as much engaged in a warlike operation as a warship. It is not necessary to have troops

(1) [1921] A. C. 107.
(2) Ibid. 127.
(3) Ibid. 133.
(4) [1921] 2 A. C. 141, 148.
(5) [1921] 1 K. B. 122.
(6) (1921) 38 Times L. R. 160.
(7) [1921] 1 A. C. 99, 116.

on board; it is sufficient if the ship is bound for a war base. In regard to the character of the ship herself there is no difference between the ship in this case and the ship in the *St. Oswald Case*; both were merchant ships.

Claughton Scott in reply. The award of the arbitrator ought to be upheld. The question is one of fact upon which the arbitrator has found quite properly on the evidence before him. The respondents have not discharged the onus upon them of showing that this was a war risk.

Lord Sterndale M.R. This is an appeal from a decision of Bailhache J. on a special case stated by an arbitrator and it raises the question of war risk or marine risk which has so often been before the Courts. The arbitrator, so far as he has found, has found that the loss of the ship, the *Geelong*, was caused by a marine peril and not by a war peril. The learned judge has found that it was caused by a war peril. The question arises in this way: The *Geelong* was a ship requisitioned by the Government of the Australian Commonwealth and by the terms of the requisition it was provided: "The Commonwealth Government accepts full war risks and will indemnify the owners against any claim arising from the requisition in this connection; but owners must take all ordinary sea risks which could be covered by an ordinary marine policy in ordinary times of peace."

The vessel with which the *Geelong* came into collision was called the *Bonvilston*. What she was doing is stated in this way by the arbitrator: "The *Bonvilston* at the time of the collision was proceeding from Mudros to Alexandria. She was under requisition by the British Government and was carrying ambulance wagons and other Government stores from one war base (Mudros) to another war base (Alexandria). . . . . She was steaming at her best speed and was showing no lights."

I think Mr. MacKinnon is probably right in saying that the learned arbitrator was not addressing his mind very much to any particular difference between the facts of this case and those of other cases—but he did find, as I said, as

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a question of fact, so far as it was one, that the loss was caused by a marine peril and not by a war peril.

The learned judge has reversed that finding and has held that the collision was caused by a war peril, and he has based his decision, in a great measure, upon what was said by Lord Atkinson in his judgment in the House of Lords in the *Petersham Case* (1) when dealing with the *St. Oswald's Case.* The learned judge said : " Now in my opinion a vessel engaged as the *Bonvilston* was in carrying Government stores and ambulance wagons from one war base to another war base is engaged in a warlike operation," and he must state that as a conclusion of law, because otherwise he does not get away from the finding of fact by the arbitrator.

I am not prepared to assent to such a broad proposition as that. I can quite conceive that a merchant vessel may be carrying ambulance wagons and other Government stores from one war base to another war base and still in certain circumstances may not be engaged in a warlike operation, and I think, if left to myself, I should have said that we have not here sufficient information or sufficient findings of fact to determine whether the learned judge is right in his decision or not. I should personally have been inclined to ask for a more distinct finding as to what this vessel was in fact doing and for this reason : she was carrying these goods from Mudros to Alexandria, she was carrying them upon January 1, 1916, and we may take judicial notice that about that time the evacuation of the troops from Gallipoli was taking place. Now if what she was doing was a part of the operation of the evacuation of Gallipoli I think she would be carrying out a warlike operation just as much as she would have been if she had been carrying things for the purpose of the landing upon Gallipoli. It seems to me it is just as much a warlike operation to withdraw in the face of the enemy, as it is to advance ; but it seems to be, at any rate, consistent with what is stated in the special case that she might have been doing these things independently of the evacuation of the troops from Gallipoli altogether.

(1) [1921] 1 A. C. 99, 116.

Therefore I should personally have liked to have a more complete finding as to what she was really doing and what were the incidents and the circumstances of her particular occupation at the time, but both the other members of the Court are of opinion that we have sufficient material upon which to deal with this matter, and that we are entitled to consider the fact that this evacuation was going on, and the neighbourhood and position of the two bases between which these goods were being moved, and therefore that we have enough to lead us to the same conclusion as that to which the learned judge came, that this was a warlike operation—that is to say, that the *Bonvilston* was engaged in a warlike operation at the time she came into collision with the *Geelong*. If that is so, then upon the authorities in the House of Lords this loss arose from a warlike operation and was a war risk, not a marine risk. I do not dissent—although I think I should have required further information if I had had to decide the matter entirely myself—from the opinion of the two other members of the Court. The appeal must be dismissed.

Warrington L.J. I am of the same opinion. The question really is whether the *Bonvilston* which ran down and sank the *Geelong* was at the time of the collision engaged in a warlike operation, because if so, the loss of the *Geelong* would be a consequence of a warlike operation—namely, the particular voyage of the other ship, the *Bonvilston*.

The collision happened on January 1, 1916, in the Eastern Mediterranean. The *Geelong* was bound outwards from Port Said and was certainly not herself engaged in a warlike operation. It is true that she was carrying a cargo on account of the Government, but that it was on account of the Government was a purely immaterial fact, and there is no question about it, her voyage was not a warlike operation. The *Bonvilston* was in a different position; she was bound from Mudros to Alexandria, her cargo consisted of ambulance wagons, and other Government stores being transported from Mudros to Alexandria. Now Mudros is found by the

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arbitrator to have been a war base, Alexandria also is found by the arbitrator to be a war base, and he has found therefore that the *Bonvilston* was at the time of the collision engaged in carrying ambulance wagons and other Government stores from one war base to another war base. Upon that state of facts, taken as he has expressed it, the arbitrator came to the conclusion and found as a fact, so far as the question was one of fact, and held in law, so far as the question was one of law, that the risk incurred by the *Geelong* was a marine risk and not a war risk. The learned judge has come to the opposite conclusion, and has founded his judgment upon the fact that the *Bonvilston* was engaged in carrying equipment consisting of the ambulance wagons from one war base to the other war base. I express no definite opinion as to whether in that state of facts I should have come to the same conclusion as the learned judge, but I think we are at liberty to look at the facts from rather a wider point of view.

The collision happened, as I have said, on January 1, 1916. I think we are at liberty to take judicial notice of the main historical facts surrounding what happened. Now of those facts two, I think, are material. First that that was about the time when the evacuation of the Gallipoli peninsula was taking place—I think the first part of the evacuation had been completed so far as troops were concerned, the evacuation of Helles I think took place a few days later, but at any rate it was in the middle of the operations connected with the evacuation of the Gallipoli peninsula; not only that, but it is a notorious fact that Mudros was the advanced base for the operations in Gallipoli. Now bearing that in mind—and I think we are at liberty to bear that in mind—I think the conclusion is almost inevitable that the *Bonvilston* was carrying warlike equipment from Mudros, which had been the base for the Gallipoli operations, to Alexandria, which was then, and afterwards, the base both for the Palestine and Salonika operations. The *Bonvilston* was employed in carrying warlike equipment from base to base in connection with the evacuation.

I now turn to look at what Lord Atkinson says about a similar operation—namely, that, as a consequence of which,

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the *St. Oswald* was lost, that is the ship which was the subject of the decision in *British and Foreign Steamship Co.* v. *The King*. (1) That was a case which it was necessary for Lord Atkinson to distinguish from the case of the *Petersham* with which he was himself dealing in the *British Steamship Co.* v. *The King*. (2) The loss of the *Petersham* happened by reason simply that two merchant ships had been sailing under Admiralty orders at night without lights, and at first sight, owing to the form of an admission which had been made in the *St. Oswald Case*, it would appear that the decision in the *St. Oswald Case* was exactly contrary to the decision at which the House of Lords were arriving in the *Petersham Case*, and accordingly it was necessary for Lord Atkinson to distinguish that case. One of the distinctions which he points out is this (3): "She (the *St. Oswald*) was, at the time of her loss, employed in obedience to these orders"—that is the Admiralty orders—"on a service which was in its own nature a 'warlike operation'—namely, in carrying some of the combative forces of the Crown from Gallipoli (upon its evacuation) to some other destination. It is true that at the time of her collision with the French battleship, the *Suffren*, she had not got these troops on board, but she was, under Admiralty orders, hurrying at full speed to the port at which she was to take them on board." There is, in my opinion, no material distinction between carrying the actual combative forces of the Crown and carrying the equipment which will be necessary for their effective use in the field. Now the equipment which the *Bonvilston* was carrying consisted of ambulance wagons, which were part of the equipment for troops operating in the field. It seems to me therefore that if, as Lord Atkinson thought, the *St. Oswald* was engaged on a service which was, in its nature, a warlike operation, so in this case, looking at it in the broader way in which I have ventured to do as connected with the evacuation of Gallipoli, the *Bonvilston* was engaged on a service which was in its nature a warlike operation.

(1) [1918] 2 K. B. 879. (2) [1921] 1 A. C. 99.
(3) [1921] 1 A. C. 99, 116.

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If that is so, then I think we are at liberty to hold that the arbitrator came to the wrong conclusion in finding that the risk was a marine risk, that the judgment of Bailhache J. was correct, and that the appeal ought therefore to be dismissed.

Scrutton L.J. The exact question in this case is whether a particular ship was lost in the Mediterranean by a marine risk or a war peril. That turns on the question whether the loss would have been recovered under the main body of a Lloyd's policy, or would have been excluded by a warranty free of all consequences of hostilities or warlike operations. The question therefore is whether the loss was the consequence of hostilities or warlike operations. The vessel was sunk by a collision at night without negligence whilst sailing without lights with a vessel called the *Bonvilston* which, under the requisition of the British Government, was carrying ambulance wagons and other Government stores from one war base, Mudros, to another war base, Alexandria. I am prepared to hold that carrying ambulance wagons and Government stores from one war base to another in time of war was a warlike operation. I notice that some of the noble Lords have seen that the definition of "warlike operations" is a very difficult matter, and have postponed it till various indefinite periods. It is possible that our decision in this case may anticipate the opportunity they have been looking for and give them an opportunity of defining it there. If I am right that the carrying of war stores from one base to another war base was a warlike operation, then I am bound by the second set of decisions in the House of Lords, there being no negligence, to hold that the sinking of the ship by a collision with a vessel engaged in such a warlike operation does make the matter a war risk as being a consequence of warlike operations. I also think, though it is not necessary for my decision on the view I take, that we are at liberty to take from the *St. Oswald Case* the fact that Gallipoli was being evacuated on December 31 and January 1, and to conclude that this voyage from Mudros to Egypt on

January 1 was part of the warlike operation of the evacuation of Gallipoli. This, of course, if correct, makes the case much stronger.

It seems to me useless to discuss the difficult question of causal connection, because, in my view, it has been settled for us by the House of Lords. I therefore agree that the decision of Bailhache J. should be affirmed.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondents: *Ince, Colt, Ince & Roscoe.*

W. I. C.

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Landlord and Tenant—Notice to quit to Landlord by Tenant—Notice to quit to Sub-tenant by Tenant—Holding over of Sub-tenant as statutory Tenant under Increase of Rent and Mortgage Interest (Restrictions) Acts—Inability of Tenant to give Landlord vacant Possession—Claim by Landlord against Tenant for Use and Occupation.

A tenant gave his landlord due notice to quit, and also gave due notice to his sub-tenant of part of the premises to quit at the termination of the tenant's tenancy. The sub-tenant, being entitled under the provisions of the Increase of Rent, &c. (Restrictions), Acts to continue in occupation, refused to quit. The tenant duly gave up possession to the landlord of his part of the premises, but was, for the above reasons, unable to give vacant possession of the whole :—

Held, that as the tenant had done all he could do to give vacant possession, he was not liable to the landlord for use and occupation for the period during which the latter was kept out of possession.

Harding v. *Crethorn* (1793) 1 Esp. 57; *Ibbs* v. *Richardson* (1839) 9 Ad. & E. 849; and *Henderson* v. *Squire* (1869) L. R. 4 Q. B. 170 distinguished

Appeal from the Barnet County Court.

The plaintiff, Ernest John Reynolds, was the owner of a house, 81 Friern Barnet Road, New Southgate, and on September 30, 1915, he let it to the defendant, Robert Park Bannerman, on an agreement which provided (inter alia) that the tenancy should be determinable, after the first three years, by a six months' notice to quit. In August, 1917,

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the defendant sublet a portion of the premises to a Mrs. Baldwin on a weekly tenancy. In September, 1919, the defendant gave due notice to quit on March 25, 1920, and he also gave his sub-tenant, Mrs. Baldwin, due notice to quit on or before that date. On March 25, 1920, the defendant himself went out of possession; but Mrs. Baldwin refused to do so, relying on the provisions of the Increase of Rent, &c. (Restrictions), Act then in force. She continued in occupation, paying rent to neither the plaintiff nor the defendant, as neither of them demanded it, but paying rates and taxes until August, 1921, when she gave up possession. The plaintiff then retook possession, and brought this action against the defendant, claiming 60*l.*, being six quarters' rent, or, alternatively, the same sum as for use and occupation. The county court judge gave judgment for the plaintiff for that amount.

The defendant appealed.

Arnold Baker (*Croom-Johnson* with him) for the defendant. The judgment of the county court judge was wrong. The defendant's tenancy determined on March 25, 1920, on the expiration of the notice to quit: *Tayleur* v. *Wildin* (1) where it was held that although a notice to quit was withdrawn during its currency, the tenancy terminated at the time when it would otherwise have expired. That case was severely criticised in the Irish case of *Lord Inchiquin* v. *Lyons*. (2) But in *Freeman* v. *Evans* (3) the Court of Appeal followed *Tayleur* v. *Wildin* (1) and did not follow *Lord Inchiquin* v. *Lyons*. (2) A tenant staying on after the expiration of a notice to quit does so under a new tenancy: see per Lush J. in *Davies* v. *Bristow*. (4) By the operation of s. 15, sub-s. 3, of the Increase of Rent, &c. (Restrictions), Act, 1920 (5),

(1) (1868) L. R. 3 Ex. 303.
(2) (1887) 20 L. R. Ir. 474.
(3) [1922] 1 Ch. 36.
(4) [1920] 3 K. B. 428, 438.
(5) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 15, sub-s. 3: "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of

Mrs. Baldwin on March 25, 1920, became tenant to the plaintiff. The words "any other reason" in the sub-section cover the case of a voluntary determination of the tenancy, as was the present case.

[*Barton* v. *Fincham* (1) was referred to.]

It will be said that the Act of 1920, which did not come into force until July 2, 1920, after the expiration of the notice to quit, does not apply. But whether or not the whole Act is retrospective, it is contended that s. 15, sub-s. 3 (2), is, for it is declaratory of what the law is; it is not an enacting clause, but only protects existing interests: see Halsbury's Laws of England, vol. xxvii., para. 306, and *Remon* v. *City of London Real Property Co.* (3)

Ralph Thomas for the plaintiff. The judgment of the county court judge was right. The plaintiff was entitled to vacant possession, and the defendant, even though he has done all he can to get the sub-tenant out, is still liable either for rent or for use and occupation: per Lord Kenyon in *Harding* v. *Crethorn* (4), subsequently approved in *Henderson* v. *Squire*. (5) See also *Ibbs* v. *Richardson*. (6)

[*Croom-Johnson*. In *Ibbs* v. *Richardson* (6) the tenant had distrained on his sub-tenant after the termination of his own tenancy, and he, not the sub-tenant, was claiming the tenancy and keeping the landlord out—see the judgment of Lord Denman.]

[SWIFT J. In *Harding* v. *Crethorn* (4) the landlord had done things which recognized the sub-tenant as his tenant. The parties did for themselves what is now done for them by s. 15, sub-s. 3, of the Act of 1920.]

[ACTON J. And in *Henderson* v. *Squire* (5) damages, not rent, were recovered.]

There is a distinction between the termination of a tenancy and the termination of an interest in the premises, and as

this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

(1) [1921] 2 K. B. 291, 297.
(2) See note (5) ante, p. 720.
(3) [1921] 1 K. B. 49, 55.
(4) 1 Esp. 57.
(5) L. R. 4 Q. B. 170.
(6) 9 Ad. & E. 849.

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long as the latter subsisted in the defendant Mrs. Baldwin remained his tenant, and he occupied through her. It is only where the interest is determined as the result of an order or judgment for possession or ejectment or something analogous that s. 15, sub-s. 3, makes the sub-tenant tenant to the landlord, for the words "or for any other reason" must be construed as ejusdem generis with the preceding words, and therefore as referring to a compulsory determination. Retrospective effect will not be given to the sub-section, because it takes away rights—namely, those of the landlord.

[*Jenner* v. *Clegg* (1) was also referred to.]

No reply was called for.

SWIFT J. This is an appeal from the Barnet County Court and raises a point of considerable interest and of some little difficulty in connection with the Increase of Rent, &c. (Restrictions), Act, 1920, and the Acts preceding it. The case has been excellently argued on both sides. Our attention has been drawn to a number of cases and we do not think it necessary to take any further time to consider our judgment. The plaintiff, the respondent, was the owner of a house which he let to the defendant, the appellant, at some time before 1915, on the terms that the tenancy should be terminable after three years on six months' notice to quit. In 1915, and before any of the Rent Restrictions Acts had been passed, the defendant sublet a portion of the house to a Mrs. Baldwin as a weekly tenant. In 1919, the defendant gave six months' notice to quit on March 25, 1920, and also gave to Mrs. Baldwin, his sub-tenant, the requisite week's notice which would bring her tenancy to an end at the same time as or before the termination of his own tenancy. So that, as far as he was able, he put himself in a position to leave the premises without further liability to the plaintiff. But Mrs. Baldwin was not minded to leave, and she was protected in her desire to stay by the various Rent Restrictions

(1) (1832) 1 Moo. & R. 213.

Acts passed up to that date—that is, March 25, 1920. The position was, that when the defendant had, by proper notice, terminated the relation which existed between him and the plaintiff, and had given up the key of the premises, Mrs. Baldwin refused to go and could not be turned out either by the plaintiff or the defendant; and she continued to occupy her part of the premises up to August, 1921, paying rent to nobody, because neither plaintiff nor defendant demanded it, but paying rates and taxes, up to August, 1921. She left the premises in that month, and thereupon the plaintiff resumed possession. He then brought this action against the defendant for the recovery of six quarters' rent, to September, 1921, in which he recovered judgment. The defendant appeals from that judgment, and contends before us that he gave up possession of the premises on March 25, 1920, and that he is in no way responsible for any rent or payments for use and occupation after that date. On behalf of the plaintiff it is contended that as the defendant did not give vacant possession he continued in occupation by his sub-tenant, Mrs. Baldwin, and is consequently answerable for the rent or for use and occupation up to the time when she went out.

In my view on these facts the plaintiff's contention is wrong. The defendant did everything he could do to give vacant possession on March 25; it was not at his wish but against it that Mrs. Baldwin remained on, and she could in no sense be said to be his agent for the purpose of occupying the premises. She had gone into occupation lawfully as the defendant's sub-tenant, but remained in possession only by virtue of the Rent (Restrictions) Acts then in force which prevented her from being turned out. The case is different from that of a tenant who, having sublet to another, on the expiration of his tenancy leaves the sub-tenant in possession, either willingly, or as having assented by taking no steps to turn him out. Such a case as that of *Henderson* v. *Squire* (1) is, to my mind, entirely different from that of a person who, after the tenant has gone out, remains in

(1) L. R. 4 Q. B. 170.

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occupation by virtue of a statutory right which the tenant cannot in any way interfere with. In *Henderson* v. *Squire* (1) the tenant, if so minded, could have taken steps to get rid of the sub-tenant, but did not do so, and, having done nothing to determine his own occupation of the premises through the agency of his sub-tenant was held liable to his landlord in damages. But in the case we are considering there was nothing more that the tenant could have done to get possession of the premises for the landlord and the thing which prevented him from doing so was the statute. I do not think that occupation of the sub-tenant by virtue of the Act of Parliament can be held to be occupation by the defendant by an agent, and to my mind the defendant ceased altogether to occupy on March 25. I am confirmed in this view by the wording of s. 15, sub-s. 3, of the Increase of Rent, &c. (Restrictions), Act, 1920. (2) Whether or not that section applies to the particular facts of this case I need not consider. It is obvious on reading it that the Legislature contemplated the position that a tenant's interest in the premises might cease while a sub-tenant remained in occupation. The whole object of the sub-section is to regulate the position of such a sub-tenant, and if the tenant's interest cannot cease while the sub-tenant is in possession, then it seems to me that the sub-section is useless. The mere fact that a person is in possession who has originally got possession as a sub-tenant, does not prevent the interest of the tenant ceasing at the expiration of his notice to quit.

It is said that s. 15, sub-s. 3, is declaratory of the law which was in existence from the time when the Rent (Restrictions) Acts came into force, but which has not been laid down specifically in any of them, and was declaratory of the right view to be taken before the passing of the Act of 1920. I think that view is right, but I do not think the sub-section is really very material to the present case. As I have said I think it is intended to regulate the relation of the landlord and the sub-tenant when the tenant has dropped out. It provides that when the tenant's interest has

(1) L. R. 4 Q. B. 170.

(2) See note (5) ante, p. 720.

determined the sub-tenant's interest shall become that of tenant to the landlord. It is only material as showing that a tenant may cease to be interested in the premises while his sub-tenant still occupies, and I have come to the conclusion that the defendant's interest did then cease. I think, on the evidence before the county court judge, that there was no other conclusion he could properly have come to, and that in deciding as he did he was wrong. The appeal, therefore, must be allowed.

ACTON J. I am of the same opinion, and on the same grounds. I think it important to observe that the claim as originally launched in the county court was for six quarters' rent, and, alternatively, for a similar sum for use and occupation, and it was with those two claims only that the Court below, and, consequently, this Court is concerned. This seems to me important in this way. A number of cases were cited to us as establishing the proposition that, in the words of Lord Kenyon in *Harding* v. *Crethorn* (1): "When a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term." I have looked to see if there is any authority showing that before the Rent (Restrictions) Acts came into operation, in the circumstances referred to by Lord Kenyon, any claim for use and occupation could have arisen, and it seems to me doubtful whether any case can be relied upon for any proposition other than this, that a claim for damages could be maintained—namely, the cost of expelling the sub-tenant and the value of the premises during the period necessarily occupied in the process of expelling him—that is, the rent the landlord might have got for the premises from another. That quite clearly is a remedy which is not of the same character and does not cover anything like the same ground as is sought to be covered by the present claim, a necessary

(1) 1 Esp. 57.

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implication from which is, of course, that a similar claim might have been put forward in the future as long as the Increase of Rent, &c., Act, continued in operation, had Mrs. Baldwin continued to stay on. With regard to the claim as formulated, I understood Mr. Thomas for the plaintiff to admit that he could not justify a claim for rent apart from the statutory tenancy, but claimed for use and occupation. The authorities to which he referred, and which seem to me to establish a proposition which will not avail him, were *Harding* v. *Crethorn* (1), *Ibbs* v. *Richardson* (2), and *Henderson* v. *Squire*. (3) They are all old cases and deal with the law as it was before the recent legislation, at a time when the tenant had it in his power to get rid of his sub-tenant by giving him notice to quit, and by following that up, if necessary, by appropriate legal proceedings ; and I apprehend that the right to damages which accrued to the landlord must have arisen because of the tenant's omission to take those steps. That seems to me to be the whole of the foundation of the cases upon which Mr. Thomas relied. In the present case, although the defendant did everything in his power to get the sub-tenant out, and could do nothing more, the sub-tenant stayed on and moreover was entitled to stay on by the operation of a statutory enactment quite independently of any right derived from the defendant as her landlord. That seems to me to make the clearest possible distinction between those cases and the present case. The matter may be tested in this way. In the present circumstances supposing a claim for damages were brought against the defendant, could he be made liable ? It seems to me that the answer must be no. He has done nothing he ought not to have done, and everything he ought to have done. It seems to me therefore a fortiori that he cannot be held liable as for use and occupation, because as Swift J. has said, having regard to the rights conferred on the sub-tenant by the statute it cannot be said that the tenant by any agency, or by reason of any circumstances for which he is responsible, has

(1) 1 Esp. 57. (2) 9 Ad. & E. 849.
(3) L. R. 4 Q. B. 170.

put Mrs. Baldwin into these premises or suffered her to use and occupy them. I therefore agree that the claim cannot succeed.

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Appeal allowed.

Solicitors for plaintiff: *Barfield & Barfield.*
Solicitors for defendant: *Wilkinson, Bowen & Jackson.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

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WHITE AND ANOTHER *v.* WILLIAMS.

Real Property—Conveyance of Land—General Words—"Privileges, rights and advantages"—Right "reputed as appurtenant"—Profit à prendre—Sheepwalk—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

By s. 6, sub-s. 1, of the Conveyancing Act, 1881: "A conveyance of land shall be deemed to include and shall . . . . operate to convey, with the land, all . . . . commons . . . . privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land . . . . or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land."

At the date of the conveyance of an upland farm in North Wales there was appertaining to the farm and exercised and enjoyed therewith and reputed and known as appurtenant thereto a sheepwalk, or right of depasturing sheep, on an adjoining mountain:—

Held, that this right passed with the farm, notwithstanding that it was a profit à prendre in alieno solo.

APPEAL from the judgment of a Divisional Court affirming a judgment of the county court of Carnarvonshire holden at Portmadoc.

The particulars of claim in the county court stated as follows:—

"1. The plaintiffs are the owners as tenants in common in fee simple in possession of the mountain sheep walk known as Cwm-yr-haf, or Craig Goch, in the parish of Dolbenmaen in the county of Carnarvon containing by admeasurement 772 acres, 1 rood, and 36 perches or thereabouts.

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"2. On June 24, 1920, the defendants by themselves their servants or agents broke and entered the said land and depastured the same with 250 sheep.

"The plaintiffs claim :—

"(*a*) Damage to herbage caused by the said sheep between June 24, 1920, and before action brought at the rate of 1*s.* 6*d.* per head, 25*l.*

"(*b*) An injunction restraining the defendants their servants and agents from any repetition of the acts complained of, and

"(*c*) A declaration that the defendants are in no way entitled to depasture sheep or other animals on the said mountain sheep walk without the consent and approval of the plaintiffs."

The defendant claimed the right to depasture her sheep on Cwm-yr-haf as appurtenant to her farm known as Rhwng-y-ddwy-afon, which was conveyed to her by a deed of May 1, 1908, hereafter mentioned. She contended that this right, being appurtenant to the farm, passed to her by virtue of s. 6 of the Conveyancing Act, 1881. (1)

The title of the parties respectively as disclosed by the evidence in the county court was as follows :—

On August 20, 1907, portion of the Brynkir Estate in the

(1) Conveyancing Act, 1881, s. 6: "(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

"(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed. . . . .

"(3.) A conveyance of a manor shall be deemed to include . . . . all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries . . . . fishings, fisheries, ... liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain. . . . . "

county of Carnarvon was offered for sale by auction at Criccieth by the Rev. George Augustus Ward Huddart and Charles Roberts French, the trustees of the will of George Augustus Huddart then deceased. The property was offered in lots. Lot 6 consisted of an upland farm with farmhouse and outbuildings known as Rhwng-y-ddwy-afon and about 337 acres of land. The particulars of sale contained the following statements :—

"(*a*) The right of sheep pasturage hitherto enjoyed by this holding in common with others on Craig Goch or Cwm-yr-haf and Ffridd Cwm-yr-haf sheep-walk (now forming part of Lot 8) is included in this Lot, and this Lot is sold with the benefit of the same.

"(*b*) The minerals underlying Nos. 185 and 213"—Ffridd bach Mynydd, 7 acres, 2 roods, 17 perches and Ffrydd Mynydd, 16 acres and 24 perches—"in this Lot are claimed by the Crown. . . . ."

Lot 8 consisted firstly of an upland grazing farm with a farmhouse, land, and buildings known as Tydden Mawr containing about 447 acres, and secondly of a mountain sheepwalk known as Cwm-yr-haf, or Craig Goch, containing about 772 acres and Ffridd Cwm-yr-haf, containing 25 acres, 1 rood, 14 perches. The particulars of sale stated that : "The sheepwalk on Llwyd Mawr known as Craig Goch or Cwm-yr-haf and Ffridd Cwm-yr-haf are sold with this Lot, and this Lot is sold subject to and with the benefit as now enjoyed of the right of the sheep pasturage thereon which has hitherto been attached to this farm in common with other holdings.

"This sheepwalk affords capital pasturage while some parts are well covered with heather, affording good cover for grouse and other game, and all the sporting rights over this sheepwalk belonging to the vendors will be sold with this Lot.

"In addition to Lots 1, 2, 5, 6, and 8 the following farms (now belonging to R. M. Greaves, Esq.) have rights of sheep pasturage on Craig Goch or Cwm-yr-haf and Ffridd

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Cwm-yr-haf, viz."—there followed the names of five farms as enjoying the said rights.

No. 9 of the Conditions of Sale provided that the several lots were sold subject to the rights and claims mentioned in the particulars and to all Crown, quit, fee farm, chief, and other rents, rights of way, water, light, and other easements, and to all claims of the Crown to mines and minerals. It continued: "As to any Lots sold subject to a right of way or road . . . . or to rights of pasturage, shooting, sporting, water, or turbary expressly mentioned in the particulars or subsequently ascertained to effect such Lot effect shall if required by the vendors be given to such rights and reservations in the conveyances to the respective purchasers by proper provisions. . . . . The rights of pasturage over the sheepwalk 786, 786A and 787"—i.e., Cwm-yr-haf sheepwalk and Ffridd Cwm-yr-haf sheepwalk—"part of Lot 8, now enjoyed by the occupiers of Lots 1, 2, 5, and 6 are intended to be secured in perpetuity for the benefit of those Lots and accordingly Lot 8 is sold and will be conveyed subject to such rights and to all similar rights referred to in the particulars but the vendors shall not be required to give particulars of the nature or extent of such rights or to make any grant or conveyance thereof to the purchasers of Lots 1, 2, 5, and 6."

At this auction Edward Ellis Roberts, the brother of the defendant Margaret Roberts, became the purchaser of Lot 6.

By an indenture dated November 19, 1907, the said G. A. W. Huddart and C. R. French as trustees conveyed to Edward Ellis Roberts Rhwng-y-ddwy-afon and the premises, "which said premises constituted Lot 6 at the sale by auction at Criccieth North Wales on August 20, 1907, of the remaining portions of the Brynkir Estate," to hold all the said hereditaments and premises to the said Edward Ellis Roberts his heirs and assigns for ever.

By an indenture dated May 1, 1908, the said Edward Ellis Roberts conveyed the farmhouse Rhwng-y-ddwy-afon and the 337 acres aforesaid to the defendant Margaret Williams in fee simple.

Lot 8 was not sold at the auction in August, 1907; but the lands and hereditaments comprised in that Lot were in the year 1913 sold by private treaty to one David William Owen, and by an indenture dated August 2, 1913, the then trustees of the estate of George Augustus Huddart conveyed Tydden Mawr and 447 acres and the sheepwalk known as Cwm-yr-haf or Craig Goch containing about 772 acres to hold the said premises unto and to the use of the said David William Owen in fee simple.

By an indenture dated March 26, 1920, and made between the said David William Owen of the one part and the plaintiffs of the other part, after reciting that D. W. Owen had agreed to sell to the plaintiffs the hereditaments intended to be thereby assured for the sum of 100*l.*, it was witnessed that in consideration of the sum of 100*l.* paid by the plaintiffs the said D. W. Owen as beneficial owner conveyed to the plaintiffs "Firstly all that mountain sheepwalk known as Cwm-yr-haf or Craig Goch in the parish of Dolbenmaen in the County of Carnarvon containing by admeasurement 77 2 acres, 1 rood, 36 perches or thereabouts with the appurtenances thereto belonging" as delineated in the plan annexed to the indenture and described in the schedule thereto, and "Secondly all that piece or parcel of land . . . . containing by admeasurement 25 acres, 1 rood, 14 perches or thereabouts known as Ffridd Cwm-yr-haf . . . . save and excepting all rights and (sic) turbary or common (if any) up to March 14, 1890, enjoyed by the occupier of the said premises on other lands then belonging to Sir Hugh John Ellis Nanney, Baronet, And also save and excepting thereout all ores mines minerals coal limestone or slate and all rights powers and privileges reserved in or affecting the said premises by virtue of any Act of Parliament or award thereunder To hold the same unto and to the use of" the plaintiffs "in fee simple as tenants in common subject to all rights of way or common or other easements (if any) affecting the same."

The county court judge gave judgment for the defendants. He appended to his judgment the following note: "I came

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to the following conclusions of fact and law: That the particulars of the sale by auction at Criccieth on August 20, 1907, were sufficiently referred to in the conveyance of November 19, 1907, to Edward Ellis Roberts to entitle the defendant to put them in evidence; that the right of depasturing sheep on Craig Goch was a right at all times appertaining to Rhwng-y-ddwy-afon Farm and had always been exercised and enjoyed with and reputed and known as appurtenant to the farm, and therefore by virtue of the Conveyancing Act, 1881, s. 6, it passed under the deeds of November 19, 1907, and May 1, 1908, to the grantees without specific mention, and that the operation of the Act was not affected by the refusal of the grantor in the deed of November 19, 1907, to allow a superfluous express grant to be introduced into the deed of November 19, 1907; that there was no satisfactory proof that Mr. Huddart was the owner in fee simple of Craig Goch; that the right of depasturing sheep thereon was always enjoyed by the tenant of Rhwng-y-ddwy-afon as incident to the tenancy of the farm in common with other farmers having similar rights in respect of their farms; that no separate rent was ever paid by them to Mr. Huddart, but that the benefit of the depasturing right was covered by the rent of the farm; and that there was no proof of acts of ownership exercised by Mr. Huddart upon or in relation to Craig Goch that were referable only to fee simple ownership and not equally referable to a right of common or pasturage."

The plaintiffs appealed to the Divisional Court. On October 25, 1921, that Court (Horridge and Shearman JJ.) dismissed the appeal.

The plaintiffs appealed.

J. E. G. de Montmorency for the appellants. The general words in s. 6, sub-s. 1, of the Conveyancing Act, 1881, are not sufficient to pass the right claimed by the respondent in this action to depasture her sheep on Craig Goch.

1. The right being a profit à prendre in the land of another

cannot be claimed by custom : *Gateward's Case* (1) ; *Blewett* v. *Tregonning* (2) ; *Constable* v. *Nicholson* (3) ; Carson's Real Property Statutes, 2nd ed. (1910), p. 30. There is no evidence that either the alleged dominant or the alleged servient tenement is or ever was parcel of a manor, so that the tenants of one could claim common of pasture over the other.

2. Nor can the right be claimed by prescription, because the tenants or inhabitants of a district as such cannot prescribe : *Constable* v. *Nicholson*. (3) There is no evidence of incorporation of the tenants or inhabitants either by virtue of a grant from the Crown : *Lord Rivers* v. *Adams* (4) ; or otherwise, as in *Goodman* v. *Saltash Corporation*. (5)

[YOUNGER L.J. referred to *Haigh* v. *West*. (6)]

3. Neither can it be claimed as having become appurtenant to land by the mere force of general words in a conveyance thereof by one who was the owner in fee both of the land conveyed and of the land over which the right is claimed. Decisions relating to the creation and conveyance of easements are not in point. There is an essential difference between an easement and a profit à prendre. An easement does not tend to the destruction of the servient tenement ; a profit à prendre does : *Race* v. *Ward*. (7) Accordingly the one passes more freely than the other with the land with which it is enjoyed ; and words sufficient to pass an easement are not necessarily sufficient to pass a profit à prendre. It cannot be inferred that the general words, which in *Kay* v. *Oxley* (8) and *International Tea Stores* v. *Hobbs* (9) were held to convey an easement, would operate to convey a profit à prendre. Moreover all easements are not equally alienable. Permanent easements and easements of necessity pass with the dominant tenement. Discontinuous easements will pass if appropriate words are used to convey them : *Polden* v. *Bastard* (10) ; *Taws* v. *Knowles*. (11) Licences, which are

(1) (1605) 6 Rep. 59*b* ; Cro. Jac. 152.
(2) (1835) 3 Ad. & E. 554.
(3) (1863) 14 C. B. (N. S.) 230.
(4) (1878) 3 Ex. D. 361.
(5) (1882) 7 App. Cas. 633.
(6) [1893] 2 Q. B. 19.
(7) (1855) 4 E. & B. 702.
(8) (1875) L. R. 10 Q. B. 360.
(9) [1903] 2 Ch. 165.
(10) (1865) L. R. 1 Q. B. 156.
(11) [1891] 2 Q. B. 564.

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merely precarious and permissive, will not pass even by express words, for they are personal to the licensee. Neither will an easement which the grantor has no power to convey: *Quicke* v. *Chapman*. (1)

Now the right claimed in this action is claimed without stint. Such a right may perhaps be granted in gross; but if so, it is personal only and cannot be assigned. (2) As appurtenant to a hereditament it is unknown to the law: *Lord Chesterfield* v. *Harris*. (3) Moreover it is open to this further objection; it is claimed as appurtenant to an indefinite number of farms. Its user as claimed would exclude the owner of the servient tenement from the usual rights of an owner in fee simple. (4) It cannot therefore be asserted as a right known to the law, and can only be enjoyed as a licence. A licence, whether it be to enjoy an easement or a profit, is personal to the licensee and does not pass as appurtenant to a hereditament. Therefore even if it could be established that general words, such as "all rights, easements, and appurtenances," words sufficient to pass a discontinuous easement, would in general operate to convey a profit à prendre appurtenant to the land conveyed, they would nevertheless be ineffectual to pass the right claimed in this action because, not being a right recognized by the law, it can only be enjoyed as a licence.

[He also cited *Doidge* v. *Carpenter* (5) and *Baring* v. *Abingdon*. (6)]

Montgomery K.C. and *T. E. Morris* for the respondents were not called on.

BANKES L.J. This is an appeal from the judgment of a Divisional Court affirming a judgment of the county court in favour of the defendant. The action was for an alleged trespass in turning sheep upon a certain sheepwalk of which the appellants alleged that they were the owners. They

(1) [1903] 1 Ch. 659.
(2) *Weekly* v. *Wildman* (1698) 1 Ld. Raym. 405.
(3) [1908] 2 Ch. 397.
(4) *Dyce* v. *Lady James Hay* (1852) 1 Macq. 305.
(5) (1817) 6 M. & S. 47.
(6) [1892] 2 Ch. 374.

claimed damages and an injunction and a declaration that the respondent was not entitled to put her sheep on this particular ground.

In 1907 an estate was offered for sale by auction. It consisted of a number of upland farms the tenants of which together with the tenants holding under an adjoining landowner claimed the right to depasture sheep upon this same sheepwalk. The respondent's predecessor in title bought one of these farms specified as Lot 6 in the particulars of sale exhibited at the auction. It was conveyed to the purchaser by a deed dated November 19, 1907, and was described therein by its Welsh name of Rhwng-y-ddwy-afon with several pieces or parcels of land containing in all about 337 acres "which said premises constituted Lot 6 at the sale by auction at Criccieth North Wales on August 20, 1907, of the remaining portions of the Brynkir Estate." Another portion of the estate, Lot 8, was also offered, but was not sold at this auction. It consisted of another farm and of the sheepwalk in question. It was subsequently sold to the predecessor in title of the appellants, and the sheepwalk was finally for a consideration of 100*l.* conveyed to the appellants by a deed of March 26, 1920, in which it was described as: "All that mountain sheepwalk known as Cwm-yr-haf or Craig Goch in the parish of Dolbenmaen in the County of Carnarvon containing by admeasurement 772 acres, 1 rood, 36 perches, or thereabouts with the appurtenances thereto belonging which premises are delineated in the plan annexed to these presents." Then follow certain parcels to which I need not refer; and then there is this reservation: "Save and excepting all rights and (sic) turbary or common (if any) up to March 14, 1890, enjoyed by the occupier of the said premises on other lands then belonging to Sir Hugh John Ellis Nanney, Baronet, And also save and excepting thereout all ores mines minerals coal limestone or slate and all rights powers and privileges reserved in or affecting the said premises by virtue of any Act of Parliament or award thereunder." The habendum is as follows: "To hold the same unto and to the use of the purchasers in fee simple as tenants in common

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subject to all rights of way or common or other easements (if any) affecting the same."

The learned judge held that he was entitled to look at the particulars of sale, inasmuch as they were expressly referred to in the conveyance to the respondent's predecessor in title. He also had before him parol evidence of the exercise of a right of pasture on the sheepwalk by occupiers of farms held under adjoining landowners. In these circumstances he came to the following conclusions: "That the particulars of the sale by auction at Criccieth on August 20, 1907, were sufficiently referred to in the conveyance of November 19, 1907, to Edward Ellis Roberts to entitle the defendant to put them in evidence." That is a matter of law, and in my opinion the learned judge was quite right. Secondly he finds "That the right of depasturing sheep on Craig Goch was a right at all times appertaining to Rwng-y-ddwy-afon farm and had always been exercised and enjoyed with and reputed and known as appurtenant to the farm." I think the evidence before the learned judge justified him in coming to that conclusion. He continues "And therefore by virtue of the Conveyancing Act, 1881, s. 6, it passed under the deeds of November 19, 1907, and May 1, 1908, to the grantees without specific mention. . . . ."

This raises the only question of law discussed before us—namely, whether the learned judge was justified in holding that the right so described by him passed under the general words in s. 6 of the Conveyancing Act, 1881, "all privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof." Mr. de Montmorency for the appellants argued that the Court ought not to construe those general words as including any right of the nature of a profit à prendre; that it would be against public policy to do so. The right in question is a right to depasture sheep upon what is known in Wales as a sheepwalk, that is mountain land adjoining an upland farm; and for myself, unless there is some authority

to the contrary which I am bound to follow, I am prepared to hold, and I do hold, that the general words in s. 6 are quite wide enough to include, and do include, the particular right claimed in this action.

The learned judge, whose opinion is of great weight in these matters, clearly indicates that in his view Mr. Huddart, the common predecessor in title of both these parties, was not the absolute owner in fee simple of Craig Goch, the piece of land over which this right is claimed, but that it was either Crown land or common land upon which Mr. Huddart had merely the right with others to depasture sheep. It is not necessary to express an opinion upon this point, and I base my judgment on the earlier conclusions of the learned judge and on his findings of fact included therein. Those findings could only be questioned on the ground that there was no evidence, and in my opinion there was ample evidence, to support them. For these reasons I think this appeal should be dismissed.

ATKIN L.J. I agree. The respondent and her husband before her had been tenants of a Welsh farm and during the tenancy had enjoyed the right of pasturing sheep upon an extensive sheepwalk of nearly 800 acres. This right had been enjoyed in common with the tenants of some eight or nine other farms some of them belonging to the respondent's landlord, Mr. Huddart, and some of them to another landed proprietor. Mr. Huddart was formerly the owner of this farm. He was also the owner of the sheepwalk, subject to such rights if any as existed in other persons. His trustees put up the whole property for sale by auction. The particulars and conditions of sale show a clear intention to pass to the purchaser of this farm the right of depasturing sheep over the sheepwalk which had been enjoyed by former tenants of the farm. The farm was in fact sold to a brother of the respondent, and there cannot be the least doubt of the vendors' intention that the purchaser should continue to enjoy the rights which the tenant had, so far as is known, always enjoyed. The particulars of sale also recognize the

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rights of the tenants of farms other than those owned by the vendors to exercise rights of pasturage over this sheepwalk and make it one of the terms of the sale of the sheepwalk that it is subject to these rights. Thereupon a conveyance was executed to the respondent's brother and predecessor in title.

Mr. de Montmorency says it will be a black day for conveyancing if a right like this should pass to a purchaser under the general words introduced into conveyances by s. 6 of the Conveyancing Act, 1881. To my mind it would be a still blacker day if such a right did not pass under those words, because anything more contrary to justice could hardly be imagined. In my view if the common predecessor in title was the unrestricted owner in fee simple both of the farm and of the land over which this right of pasture is claimed, and if there were no common or quasi-common rights over the land, so that the right which he in fact exercised of depasturing sheep upon the land was included in his rights as owner in fee simple of both the farm and the land, the general words in s. 6 would still be sufficient to pass to the purchaser of the farm the right of depasturing sheep upon the land. Such a right is a right well known to the law and quite capable of being granted when a hereditament is severed. I think that is enough to dispose of this case. But the learned county court judge, whose experience gives great weight to his opinion, came to the conclusion that the appellants had failed to prove that Mr. Huddart was in fact the unrestricted owner in fee simple of the land, inasmuch as his acts of ownership were consistent with his merely having a right of common or pasturage over it. The particulars and conditions of sale, which are obviously admissions against him, and the evidence given in the county court confirming those admissions—namely, that tenants of other farms under different ownership had exercised rights of pasturage over this sheepwalk—constitute a considerable body of evidence in favour of the learned judge's conclusion. For these reasons I think that this appeal should be dismissed.

YOUNGER L.J. I am of the same opinion. In the year 1907 the trustees of the will of Mr. George Augustus Huddart were trustees for sale of this Welsh estate, which consisted, among other things, of several farms and this hereditament which has been called the sheepwalk. The trustees offered a portion of the estate including the farms and the sheepwalk for sale by auction in 1907. The property was offered in lots under particulars and conditions of sale, and the respondent's predecessor in title became the purchaser at the auction of Lot 6, consisting of a farm and land which were conveyed to him by a deed of November 19, 1907, in which the hereditaments conveyed were comprehensively further described as follows: "which said premises constituted Lot 6 at the sale by auction at Criccieth, North Wales, on August 20, 1907, of the remaining portions of the Brynkir Estate." The effect of this description is to introduce the relevant particulars of sale at the auction as the source from which more precise information as to the property thereby intended to be conveyed may be derived. On referring to these particulars it is found that Lot 6 included a right of pasturage over the sheepwalk which was "intended to be secured in perpetuity for the benefit of (inter alia) Lot 6." The county court judge has found that at the date of this conveyance there existed "the right of depasturing sheep on Craig Goch," that is on the sheepwalk, that it was "a right at all times appertaining to the farm included in Lot 6," and that it "had always been exercised and enjoyed with and reputed and known as appurtenant to the farm." Therefore that was what the purchaser of Lot 6 was intended to have, and the only question is whether the conveyance of November 19, 1907, gave it to him.

By s. 6 of the Conveyancing Act, 1881, that conveyance gave the purchaser, unless a contrary intention was therein expressed (and it is agreed that no such intention is there expressed), amongst other things, all commons, liberties, privileges, rights "and advantages whatsoever appertaining or reputed to appertain to the land or any part thereof," and the conveyance is to be read as if those words from

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Younger L.J.

that section were included in the parcels conveyed. Did this right of depasturing so described by the learned judge pass by a conveyance including those words? So put, the question admits of only one answer. Take the different words used in s. 6, commons, privileges, rights, advantages; what more apt words could be found to describe this right of depasturing found by the county court judge to have existed at the date of the conveyance—a right moreover plainly intended to be conveyed, as is shown by the particulars of sale. So experienced a conveyancer as Mr. de Montmorency did not, and could not, deny that this right would pass by a conveyance which referred to it in terms. In my opinion no description in terms of this particular right could be more effective to convey it than the words which I have quoted from the Conveyancing Act. If that be so it follows from Mr. de Montmorency's admission that the right passed under the deed of November 9, 1907.

The only possible objection that can be urged against this conclusion is the broad proposition that never under the general words imported into conveyances by s. 6 of the Conveyancing Act, 1881, can a profit à prendre in alieno solo pass to a purchaser. In answer to that objection I say with Bankes L.J. that unless authority is produced to support it I am not prepared to accede to it. I cannot think the contention so broadly stated is well founded. Mr. de Montmorency also contended that the right does not pass under the general words, because it was only exercised from time to time. He did not deny that there had been an intermittent user. I doubt whether we can enter upon this question in view of the finding of the county court judge; but even if no more than an intermittent and temporary user had been exercised, the right would nevertheless in my opinion be included within these words in s. 6, because it is a right known to the law and, that being so, it matters not, so far as s. 6 of the Conveyancing Act is concerned, whether the user is continuous and permanent or permissive and precarious: *International Tea Stores* v. *Hobbs*. (1)

(1) [1903] 2 Ch. 165.

There is one further aspect of this case. The sheepwalk itself was not sold at the auction in 1907. It was sold about six years later by Mr. Huddart's trustees to the appellants' predecessor in title, to whom it was conveyed by a deed of August 2, 1913. This appears to have been an out and out conveyance of the sheepwalk without qualification or reservation and without reference to any rights therein enjoyed or exercisable by other persons. But I do not doubt that the purchaser had full notice of those rights. At any rate the appellants have always had full notice of them, because the conveyance to them of March 26, 1920, is expressed to be made subject to the rights of common exercised by other persons over this land. Accordingly it is clear first that this right was intended to be conveyed to and enjoyed by the purchaser of Lot 6, and secondly that the appellants took with full notice of it. In my opinion therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Griffith & Son, for Maddocks, Ogden & Co., Coventry.*

Solicitors for respondent: *Jaques & Co., for O. Robyns Owen, Pwllheli.*

W. H. G.

C. A.

1922

March 1, 2.

[IN THE COURT OF APPEAL.]

BERTON AND OTHERS *v.* ALLIANCE ECONOMIC INVESTMENT COMPANY, LIMITED, AND OTHERS.

[1921. B. 1122.]

Landlord and Tenant—Lease—Demised Premises—Covenant to use as Dwelling House—Not to "permit or suffer" User Otherwise—Assignment—Underlease—Weekly Tenancies—Breach of Covenant—Abstention by Assignee from Legal Proceedings.

A lease of a dwelling house contained covenants by the lessee that he would not without the lessors' licence in writing use the premises or any part thereof or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling house, and would not without the lessors' licence in writing do or suffer to be done in or on the demised premises anything which might in the judgment of the lessors be or grow to the injury or annoyance of the lessors.

Assignees of the lease let the premises to a sub-lessee who covenanted not to do or permit to be done any act or thing upon the premises which might be or grow to the annoyance damage or disturbance of the assignees, and not without the written consent of the assignees to assign, underlet, or part with possession of the premises or any part thereof, and not without such consent as aforesaid to put up any bill for the letting of lodgings but to use the premises as a private dwelling house only.

Without the consent of the assignees the sub-lessee let the premises in separate tenements to a number of weekly tenants. The assignees brought an action for possession against the sub-lessee and got judgment against him; but they did not join the weekly tenants as defendants in the action nor take any steps to eject them, but advised them to apply to the lessors for leave to remain in possession; agreed with them that their rent should be paid into a joint account in the names of one of the tenants and of the assignees' solicitor; wrote to the lessors to say that if the weekly tenants were not allowed to remain an application under s. 27 of the Housing, Town Planning, &c., Act, 1919, was advised for eave to convert the premises into one or more tenements; and also wrote to the weekly tenants saying that the lessors were threatening proceedings for vacant possession, that in view of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and s. 27 of the Housing Act the legal position was uncertain, and that they would be well advised to instruct counsel in any proceedings rendered necessary by the lessors' action, of which action they expressed their disapproval.

The lessors brought an action against the assignees upon a forfeiture for breach of covenant in "permitting" the premises to be used otherwise than as a private dwelling house and for "suffering" to be done therein an act to the annoyance of the plaintiffs. The defendants not having themselves used the premises or done any act therein contrary to the terms of the lease:—

Held, that the covenants not to "permit" the unauthorized user of

the premises and not to "suffer" unauthorized acts therein did not bind the defendants to do more than to take reasonable steps to secure that the premises should be used according to the terms of the lease and not otherwise, and that they had not abstained from taking reasonable steps to secure that result merely by forbearing to take proceedings in ejectment against the under tenants the issue of which was rendered doubtful by the statutes above mentioned; that in sympathizing with the undertenants and even in advising them on their legal position the defendants were not committing a breach of the covenants, and that the plaintiffs' case failed.

Judgment of Lord Coleridge J. reversed.

APPEAL from the judgment of Lord Coleridge J. in an action tried before the learned judge without a jury.

Arthur Berton sued on behalf of himself and others the Estates Governors of Alleyn's College, Dulwich, to recover possession of a house and offices, greenhouse, and buildings known as Tollgate House, College Road, Dulwich, for breach of a covenant contained in a lease of the said premises dated December 31, 1907.

By that lease the then Governors of the College demised the said premises to John Cresswell Bayldon for a term of eighty years from March 25, 1907, at the rent therein mentioned, and the said J. C. Bayldon, the lessee, covenanted for himself and his assigns with the lessors that he would at all times during the term observe and perform the following among other conditions and agreements in respect of the said premises—that is to say, that the lessee: "14. Will not without the lessors' previous licence in writing use the premises or any part thereof or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling house wherein no business of any kind is carried on.

"15. Will not without the lessors' previous licence in writing . . . . do or suffer to be done in or on the demised premises anything which may in the judgment of the lessors be or grow to the injury or annoyance of the lessors or any of their tenants or of any of the occupiers of any contiguous or adjoining premises or of the public or neighbourhood."

The defendants were the assignees of the above-mentioned lease.

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By an indenture dated November 1, 1919, the defendants therein called the company demised the said premises to Henry Stewart MacIntosh for a term of seven years from September 29, 1919, at a yearly rent of 150*l.* and the additional rent of 2*l.* 5*s.* a year as therein mentioned; and the said lessee covenanted "not to do or permit to be done any act or thing upon the said premises which may be or grow to the annoyance nuisance damage or disturbance of the company or of the adjoining occupiers . . . ." and "not without such consent" —i.e., the written consent of the company—" to . . . . assign underlet or part with the possession of the said premises or any part thereof but such consent shall not be unreasonably withheld if a respectable and responsible person be proposed as assignee or under lessee and such person enters into a covenant with the company to pay the rent and observe and perform the covenants on the lessee's part herein contained," and "not without such consent as aforesaid to put up in upon or in front of the said premises any bill or the like for the letting of lodgings or any notification of any trade business or profession but to use the said premises as a private dwelling house only."

MacIntosh in breach of his covenants and of the covenants in the lease of December 31, 1907, let the premises in separate tenements to weekly tenants at various rents without the licence or knowledge of the defendants. As a result the defendants on May 26, 1920, brought an action of ejectment against him and on July 1, 1920, obtained an order for possession to take effect on July 13. By that time MacIntosh had given each of the undertenants a week's notice to quit, but they claimed to remain in occupation relying on the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendants took no steps against the undertenants either by action or otherwise, and they were in possession at the date of the writ in this action. Their rents were paid into an account in the joint names of one of themselves and of the managing director of the defendants who was also a member of the firm of solicitors representing the defendants.

The following correspondence took place between the parties or their representatives :—

July 12, 1920. The defendants' solicitors to the plaintiffs' solicitors : " Tollgate House—We understand that your Mr. Savill acts as solicitor for the Dulwich College Estates Governors. Our clients the Alliance Economic Investment Co. hold a lease from them of the above house at a ground rent subject to a covenant to use the house as a private dwelling house. Some time ago they let the house on lease to a Mr. MacIntosh subject to a similar covenant, but the latter proceeded to sublet to several tenants. Complaints were made by the freeholders of this being done, and a writ for recovery of possession was issued against the company's lessee. The facts being clear, judgment for possession to-day was signed by consent, and we understand that the lessee has vacated the premises.

" His sub-tenants, however, still remain, and it is as you know very doubtful whether under the Increase of Rent Act any order will be made for their ejectment. We have seen two of them and they seem very respectable people ; the tenants of the first floor are a civil servant and his wife. They . . . . guarantee that if the sub-tenants are allowed to remain the house shall have all the outward appearance of a private residence and that everything shall be quietly and respectably carried on. We advised them to apply to the Governors, but we understand that the latter at their last meeting refused the application.

" Our clients have infringed no covenant, and have taken immediate and successful steps to prevent any infringement by their underlessee. The fact that sub-tenants remain in the house is due to legislation for which our clients cannot be held responsible. On the other hand if the sub-tenants keep to their undertaking, it does not appear that any annoyance or damage will be suffered by the freeholders or the adjoining residents, while the house will be fulfilling a useful purpose. It is proposed that the residents should form themselves into a committee of management which would exercise supervision and regulate the conduct of all

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the occupants. We have pointed out to them that if they do anything which is a nuisance or annoyance to adjoining occupiers, or if the premises are deteriorating owing to acts of waste or neglect on their part, they will lose any benefit they may have under the increase of Rent Act, 1920. Subject to these conditions the company will be prepared to accept them as tenants, provided your clients will consent. The only alternative would appear to be that they stay in the house for an indefinite period, possibly for years, without supervision. We should be glad if you could put the matter before the Governors and advise them at least to allow the experiment to be given a trial."

August 9. The plaintiffs' solicitors to the defendants' solicitors: "Tollgate House—The request contained in your letter of the 12th ultimo and the circumstances mentioned by you have been considered at a Board meeting of the Estates Governors, and the Governors found themselves unable to accede to your request and passed a resolution to that effect. We should add that we do not share the view expressed in your letter that it is very doubtful whether under the Increase of Rent Act an order will be made for the ejectment of the sub-tenants. In our opinion there has been such a breach of covenant as to enable the Court to make an order under s. 5, sub-s. 1, of the Act of 1920, and we have no alternative but to ask you to take steps without delay to eject the sub-tenants."

September 14. The defendants' solicitors wrote to the plaintiffs' solicitors a letter containing the following passage: "If your clients would like to bring an action against the company for breach of covenant the facts might be put before the Court, and some solution arrived at. We cannot however see that the company has committed any breach of the covenant in their lease, since the underlease which they granted was perfectly regular, and they at once took steps to stop any irregularity on the part of their lessee. The present difficulty is caused by conditions over which the company could have no control whatever."

November 10. The defendants' secretary to the plaintiffs'

secretary: "Tollgate House—My directors are anxious to reach some agreement with you and the occupiers of this house, and ask if you will submit the matter again to the Governors. The case is as follows: The late lessee gave up possession on July 11 last and the company is securing an order of the High Court, but the occupants of a number of the rooms, all ex-Service men, with their dependents, refused to leave and are still in possession. The company is advised that action against them will not have the sympathy of the Court and that success would be doubtful. . . . . These occupiers appear to be thoroughly respectable and through a small house committee are getting the house and garden in as good condition as the uncertainty of their tenure will permit. To all intents and purposes the house appears exactly as a private house might be if occupied by a single family. I have to point out that as principal leaseholders in College Road the company are most anxious to maintain its high character, and they have this in mind in proposing the acceptance of these people as tenants.

"Having regard to the heavy financial loss the company has sustained in keeping Gosforth House empty for years in order to let to a small private family and the projected action of local authorities to commandeer such houses without safeguards as to character of tenants, I submit that the requisite authority to interested leaseholders from your Governors to deal with the houses on the lines rather forced on them at Tollgate House is wise not only in their interests but in those of the select community residing in the neighbourhood. Otherwise an application to the County Court under s. 27 of the Housing and Town Planning Act, 1919, is advised."

The plaintiffs would not consent to these suggestions and requested that the defendants would take the necessary steps to remedy the breach of covenant in their lease. On November 29, 1920, they served on the defendants a notice under s. 14 of the Conveyancing Act, 1881, calling upon them to remedy the breaches of covenant complained of. The correspondence continued:—

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January 19, 1921. The defendants' solicitors to the plaintiffs' solicitors: "Subject to the advice of counsel, which we propose now to obtain, proceedings in the local County Court will probably be commenced asking either for the ejectment of the sub-tenants or, if the judge prefers it, an order under s. 27 of the Housing Act, 1919. So far the decisions of the Courts with regard to sub-tenants holding on appear to be conflicting and inconclusive and we are by no means certain that an order for recovery of possession could be made in this case."

January 21. The defendants' solicitors to the plaintiffs' solicitors: "If counsel advises that there is any prospect of success, a summons in the local County Court will be taken out. If he advises that an alternative application under s. 27 of the Housing, &c., Act, 1919, would be advisable this might also be done, and notice of course would be given to you in order that your clients might oppose such an application if they thought fit. Our clients are the owners of 500 or 600 houses in and about London, and they do not wish to earn the reputation of harsh and unreasonable landlords by taking steps on their own initiative to drive a number of deserving tenants into the street. If this occurs the whole responsibility will be carefully placed upon the Dulwich College authorities."

January 25, 1921. The defendants' solicitors to Mr. E. A. Forster as representing the undertenants: "Tollgate House—The solicitors for the Dulwich College Estate have now written stating definitely that a writ will be issued against the Alliance, etc., Company for breach of covenant as to user of the above house otherwise than as a private dwelling house. Their only course therefore appears to be to issue a summons in the County Court to recover possession of the premises from yourself and the other sub-tenants of the late lessee. The legal position is somewhat uncertain in view of the provisions of the Increase of Rent Act, 1920, and it would be worth while for you and the other tenants to join in employing counsel to represent you on this summons. As you are aware the company are quite unsympathetic

with regard to the action of the Dulwich College Estate, and it is possible that even if the Court decided that the sub-tenants are not protected by the Increase of Rent Act it may be willing to make an order under s. 27 of the Housing and Town Planning Act, 1919, enabling the house to be converted into two or more tenements.

"It is uncertain whether any or how much actual alteration in the internal arrangements of the house is required in order to constitute 'conversion.' If it were necessary for the company, in order to bring this house under the above section, to divide the premises into separate suites or flats, we should be glad to know whether you and the other occupants would be prepared to take such suites on terms which would cover the cost of conversion and provide a reasonable rent for the whole house."

On February 26, 1921, the plaintiffs brought this action against the defendants to recover possession of Tollgate House for breach of the covenants in the lease of December 31, 1907, in permitting the premises to be used otherwise than as a private dwelling house and thereby suffering an act on the premises which was an injury and annoyance to the plaintiffs. (1) The defendants denied that their acts constituted a breach of the covenants or a permission or sufferance of the acts complained of and claimed relief under s. 14 of the Conveyancing Act, 1881, if contrary to their contention a forfeiture had been incurred. The case was heard by Lord Coleridge J. on November 22 and 23, 1921. On December 1 the learned judge gave judgment. He held that the defendants had committed the breaches of covenant

(1) It was stated in argument that between the issue of the writ and the judgment the following proceedings took place: On June 10, 1921, the defendants issued summonses in the Lambeth County Court for ejectment of the undertenants or alternatively for leave under s. 27 of the Housing, Town Planning, &c., Act, 1919, for leave to convert the premises into separate tenements. The plaintiffs brought an action to restrain the application under the Housing, Town Planning, &c., Act. The hearing of this action was ordered to stand over generally, and in consequence of this order the parties did not proceed with the summonses in the County Court. Between August and October, 1921, all the undertenants left the premises.

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alleged. He was however ready to grant them relief on their undertaking not to commit further breaches of the covenants and not to apply for an order under s. 27 of the Housing, Town Planning, &c., Act, 1919. The defendants declined to give an undertaking not to apply for an order under that section, and accordingly judgment was given for the plaintiffs.

The defendants appealed.

Inskip K.C. and *Scholefield* for the appellants. The learned judge was wrong in holding that the appellants had permitted or suffered the letting of the premises in portions as weekly tenements.

1. A covenant not to permit or suffer an act does not oblige the covenantor to bring an action if the act is done: *Toleman* v. *Portbury* (1); *Hall* v. *Ewin.* (2) "Did any one ever hear of an action against a man because he did not bring an action against his neighbour?": *Attorney-General* v. *Dorking Union* (3); per Jessel M.R.

2. There is no permission or sufferance of an act unless the covenantor has power to prevent it. A man cannot be said to permit what he cannot prevent. The permission must be by the covenantor or by some one standing towards him in the relation of an agent. The relation of lessor and lessee is not that of principal and agent: *Wilson* v. *Twamley.* (4) The underlease to MacIntosh was a perfectly lawful act; the sub-letting by him to the weekly tenants was not the act of the appellants, and the eviction of MacIntosh shows that it was not by their permission.

3. Even if a covenant not to permit or suffer an act would oblige the covenantor in certain circumstances to take legal proceedings against a person committing the act, it would not oblige him to take proceedings the result of which is a matter of reasonable doubt. The position of the occupiers of tenements within the Rent Restrictions Acts is one of the utmost uncertainty. In *Berton* v. *London and Counties House Property Co.* (5) Rowlatt J. expressed the opinion

(1) (1870) L. R. 5 Q. B. 288.
(2) (1887) 37 Ch. D. 74.
(3) (1882) 20 Ch. D. 595, 605.
(4) [1904] 2 K. B. 99.
(5) Unreported. See The Times, May 19, 1920.

that persons in the position of these undertenants were within the protection of the Act of 1915. It is true that in *Dick* v. *Jacques* (1) Peterson J. expressed a contrary opinion. The covenant cannot bind the covenantor or his assignee at his peril to elect between two conflicting decisions of the High Court. Since July 2, 1920, no order can be made to eject tenants in occupation except in the events specified in s. 5 of the Act of 1920, and even in those events an order will not be made unless the Court considers it reasonable to make one. By sub-s. 2 the application for an order may be adjourned, or execution thereof may be stayed or suspended for such period and on such conditions as the Court thinks fit. In considering this question the Court could not ignore the fact that the appellants were meditating an application under s. 27 of the Housing and Town Planning Act, 1919, for leave to convert these premises into separate tenements. The learned judge held that this project of the appellants showed that they were permitting a breach of the covenants. That is to mistake the meaning and effect of the covenants. They do not bind the covenantor to refrain from taking advantage of powers conferred by the Legislature for the public benefit. If an application under the Housing and Town Planning Act can be called a breach of the covenants it is a breach which the Legislature has sanctioned. For the same reason the learned judge was wrong in making it a condition of granting relief under s. 14 of the Conveyancing Act, 1881, to the appellants that they should abstain from making any application under the Housing and Town Planning Act.

The learned judge also relied on the letters of July 12 and November 10, 1920, and January 19, 21, and 25, 1921, as evidence that the appellants had permitted and suffered the breaches of covenant. But to sympathize with the undertenants, or even to give them advice, was not to permit or suffer them to remain in possession, unless there was power to eject them or at least a reasonable prospect of success in an attempt to do so.

(1) (1920) 36 Times L. R. 773.

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[*Tulk* v. *Moxhay* (1) and *Haywood* v. *Brunswick Building Society* (2) were also cited.]

T. Hollis Walker K.C. and *H. Claughton Scott* for the respondents. A covenant not to permit or suffer an act is broken if the covenantor has the means of stopping the act, and does not use them. The appellants were assignees of the lease of December 31, 1907, and were bound by the covenants not to permit the demised premises to be used otherwise than as a private dwelling house and not to suffer therein anything to the annoyance of the respondents. It is not disputed that a breach of these covenants was committed when MacIntosh let the premises to his undertenants. The appellants had ready means to stop a continuance of the breach; they had taken similar covenants from MacIntosh in their underlease to him; they had only to join the undertenants as defendants in their action against MacIntosh, and there would have been no answer to a claim for vacant possession: *Dick* v. *Jacques*. (3) Their act in advising the undertenants to apply to the plaintiffs for leave to remain in possession, and in allowing them to pay their rent into an account in the name of their solicitor, and their letters of January 21 and 25, 1921, show that they were rebelling against the performance of their covenants and threatening, as an obstacle in the way of their enforcement, an application under s. 27 of the Housing and Town Planning Act, 1919. These facts constitute ample evidence on which the learned judge could find that the appellants have permitted and suffered, if indeed they have not encouraged, the use of the premises otherwise than as a private dwelling house.

Counsel for the appellants were not called on in reply.

BANKES L.J. [after stating the facts continued:] Did the evidence justify the learned judge in coming to the conclusion that the appellants had permitted or suffered the acts complained of? It is not necessary to decide the question whether a lessee who has covenanted not to permit or suffer

(1) (1848) 2 Ph. 774. (2) (1881) 8 Q. B. D. 403.
(3) 36 Times L. R. 773.

an act can be held guilty of a breach of his covenant merely because he has refrained from taking legal proceedings to prevent it or to stop its continuance. This is an action on an alleged forfeiture. In such a case *Toleman* v. *Portbury* (1) is a useful authority. There the plaintiff claimed to recover possession of a dwelling house upon a forfeiture for a breach of covenant in a lease by which one Candler, the lessee, covenanted not to permit any sale by public auction to take place on the premises without the consent in writing of the plaintiff. Candler underlet the premises to one Reed and assigned all his goods and effects upon the premises to the defendants by whose direction the goods and effects were sold by public auction on the premises. The plaintiff having been non-suited on two grounds, one of which was that there was no evidence that Candler knew of or permitted the sale, obtained a rule to enter a verdict in his favour. This rule was discharged by the Court of Queen's Bench, and the plaintiff appealed to the Exchequer Chamber. In affirming the Court below Kelly C.B. said (2): "I am clearly of opinion that there was no evidence that this sale was by the permission of Candler, the lessee. I might, perhaps, have entertained that opinion, even if this had been an action of covenant; but being, as it is, an action for a forfeiture, and in which we must see that there is clear and sufficient evidence to be left to a jury that a forfeiture has actually been incurred, I think that the evidence is insufficient, and that the judge was perfectly right in non-suiting the plaintiff. . . . . It appears that Candler was the lessee, but he had completely parted with the right to the possession of these premises by having underlet them to Reed. . . . . In the first place, he had no legal right to interfere with the assignees, or with the property, or with the sale of the property. He had no right to be upon the premises, and there is no evidence that he was there. But even if he were there, it is quite consistent with the evidence, that not only did he not permit the sale, but that he actually opposed it, and endeavoured to prevent it. But it is not

(1) L. R. 5 Q. B. 288. (2) L. R. 5 Q. B. 292, 295, 296.

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Bankes L.J.

necessary that we should go so far. It is quite enough for us to say that there is not a particle of evidence in the case that he either directly or indirectly authorized the sale. And when we look to the words of the covenant, we find that the lessee covenanted that he would not *permit* any sale. There is certainly no evidence that he had power to prevent it, and there is no evidence, in fact, that he did either directly or indirectly permit it." Channell B. said: "I fully adopt the rule that where an estate is vested in the defendant by the act of the plaintiff, the plaintiff must show that the defendant is divested of that estate, and when he seeks to rely upon a forfeiture, he must prove everything to show that a forfeiture has taken place. . . . . I am clearly of opinion that there was no evidence that this act was an act done with the permission of the lessee." Cleasby B. said: "What is the covenant here? It is, that the lessee will not permit a sale without a licence in writing. It involves two things—a positive thing, permitting the sale; a negative thing, no consent in writing." The onus being on the plaintiff to establish a permission or sufferance, what is the meaning of a covenant not to permit or suffer an act? It does not mean that the covenantor will not sympathize with the person who is doing the act, or that he will not tell that person what he honestly believes his legal position to be. It does not include an obligation at all costs to take steps to prevent the act. Its scope is less extensive than that. In *Hobson* v. *Middleton* (1) one of the questions was whether the defendant had "permitted or suffered" an act whereby certain premises might become affected in title. He had in fact executed a deed to which he was a necessary party and which affected the title to the premises. Bayley J. said: "We now come to the sixth plea, to the second breach which is pleaded to so much of it as relates to, permitting and suffering, Hislop to execute the indenture in that breach mentioned. The plea says that the defendant could not prevent it: the plaintiff replies that Hislop executed it with the consent of the defendant, and the question is, whether

(1) (1827) 6 B. & C. 295, 303.

that consent was a breach of the covenant. Now the words 'permitting and suffering' do not bear the same meaning as 'knowing of and being privy to'; the meaning of them is, that the defendant should not concur in any act over which he had a control." In *Reg.* v. *Staines Local Board* (1), in which I was one of the counsel, an indictment was preferred against the Staines Local Board under one of the Thames Conservancy statutes, which made it a misdemeanour to cause or suffer sewage to flow into the Thames. The jury found a special verdict, upon which the Crown moved to enter a verdict of guilty against the Local Board. The motion was heard before Field and Wills JJ. Field J. said (2): "There are no findings of fact which show that the defendants have suffered sewage to flow through these sewers into the Thames. A man cannot be said to suffer another person to do a thing which he has no right to prevent."

Again in *Hall* v. *Ewin* (3) Lopes L.J. commenting on the words "permit or suffer" in a covenant by the defendant that he would "not permit or suffer" the house to be used for an offensive business, said: "It appears to me that we are asked to interpret those words as if they 'were hinder or prevent.' The covenant might, indeed, have been worded in that manner if the parties had thought fit, and then it might have been the duty of Ewin to prevent the house from being improperly used. I express no opinion as to the effect of such a covenant, if Ewin had been an assignee of the lease and an action of law could have been brought against him." That shows a clear distinction in the mind of Lopes L.J. between not suffering or permitting on the one side and hindering or preventing on the other. To my mind the distinction is just as clear between not permitting or suffering an act and not withholding sympathy or legal advice from those who do the act. I do not allude to the cases like *Tulk* v. *Moxhay* (4), where a person taking an estate with notice of a restrictive covenant has been held liable to be restrained by injunction

(1) (1888) 60 L. T. 261.
(2) 60 L. T. 264.
(3) 37 Ch. D. 74, 82.
(4) 2 Ph. 774.

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from acting in breach of the covenant. If the covenants in this case had imposed on the lessee a positive obligation to take legal proceedings to enforce their negative provisions, it might have been necessary to consider all those cases in order to see whether the Court would ever compel a purchaser with notice to take legal proceedings to prevent a breach of the restrictive covenant. For the reasons I have given it is not necessary to make this investigation. The next case is *Wilson* v. *Twamley*. (1) There a lessee of a public-house had covenanted that he would not do or suffer to be done on the premises any act whereby the licences might be forfeited, or the renewal of them withheld. The lease was assigned to the defendant who underlet them to a tenant; and this tenant was convicted of an offence against the licensing laws whereby the renewal of the licence was refused. Collins M.R. said (2): "I should say that, prima facie, the meaning of the words 'do or suffer to be done' is that they must involve the doing of some act, or some abstention from action, by the covenantor himself, or by some person standing in the relation of agent to him, a relation which does not exist as between lessor and lessee." There is no suggestion that the appellants did anything actively in breach of the covenants in this case. The most that is alleged against them is that they have abstained from actively interfering with a breach by the undertenants of MacIntosh. Whether that is a breach of the covenants is the same question as whether the appellants have omitted to take some step which it was reasonable for them to take in view of the facts and circumstances. Both Romer and Mathew L.JJ. based their judgments in *Wilson* v. *Twamley* (1) on a ground which might have availed the appellants here—namely, that the lessee was not responsible for the acts of the underlessee. But it is not necessary to rely on that ground, and I return to the substantial question in this case, whether there was on their part any abstention from action which would have been reasonable for them to take. Mr. Claughton Scott refrained from suggesting that the respondents were under an obligation to take action, but his learned

(1) [1904] 2 K. B. 99. (2) [1904] 2 K. B. 105.

leader made it the main ground of his argument that they were bound to do so. It is necessary therefore to consider the position of the undertenants of MacIntosh in the special circumstances created by the Rent Restriction Acts. I cannot appreciate the importance which Lord Coleridge J. has attributed to the fact that these undertenants were not included in the writ against MacIntosh. I see no ground for suggesting that they were omitted intentionally or that the omission shows that the respondents had no real desire to comply or secure compliance with the terms of the covenants. The solicitor called for the appellants stated, and his statement was not challenged, that it is the common practice not to include weekly tenants as defendants in an action against a lessee on a forfeiture for breach of covenant. The day after judgment was recovered against MacIntosh the Rent Restriction Act, 1920, came into force. By that time MacIntosh had given the undertenants notice to quit. The question is whether, even if the appellants had desired to do all they could to put the respondents in possession of the premises, it would in these circumstances have been reasonable for them to take legal proceedings to eject the undertenants. In my opinion, considering the Act of 1920 and the state of the authorities on the construction of that Act, there was enough to justify any prudent solicitor in advising his client that in proceeding against the undertenants there was no certainty of succeeding but every probability of failure ; and assuming that these covenants might in other circumstances impose a duty to take proceedings, it cannot be said that in the peculiar circumstances of this case the appellants abstained from taking reasonable steps to comply or secure compliance with them. The letters from the appellants' representatives no doubt show that they sympathized with the undertenants. They were quite right to do so. Their sympathy was no breach of covenant. It is true that they told the undertenants what, in their view, their legal position was. I cannot see any breach of covenant in that. They might have said nothing ; but if they said anything they were right to say what they really thought, and by so doing

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they do not involve their clients in any breach of these covenants. Then it is said that the appellants through their advisers indicated to the respondents that if they persisted in what they considered the unreasonable course of ejecting the undertenants, the appellants might be driven to apply under the Housing and Town Planning Act, 1919, for relief, the granting of which would bring no advantage to the respondents. In my opinion the combined effect of all these facts falls short of the mark which the respondents must reach in order to succeed; they do not amount to an abstention from taking proceedings which it was reasonable to take in the circumstances, and which might reasonably have been expected to get rid of the undertenants. I cannot agree with the conclusion arrived at by the learned judge, and I think the appeal must be allowed. It is not therefore necessary to express any opinion of the terms on which he was willing to grant relief, but I may say that it seems to me difficult to justify the condition which he imposed upon the appellants that they should renounce the powers of the Housing and Town Planning Act, 1919, conferred not for any private advantage but with a view to the public benefit. Judgment must be entered for the appellants.

ATKIN L.J. I agree. The alleged breaches of the covenants in the lease of March 25, 1907, consisted in permitting parts of the premises to be occupied as separate tenements by several tenants. In *Berton* v. *London and Counties House Property Co.* (1) this Court held that to let in separate tenements a precisely similar house in the same neighbourhood was a breach of a covenant to use the house only as a private dwelling house. There is no dispute upon that point nor is it denied that what was done was in the judgment of the lessors an annoyance. There were therefore done acts which would amount to a breach of both covenants. But the question is whether the appellants have, to put it shortly, used the premises or permitted them to be used in breach of the first covenant, or suffered them to be used in

(1) November 17, 1920. Unreported.

breach of the second. It is not suggested that there is any difference between the words "permit" and "suffer" in this context, and I treat them as having the same meaning. It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit. The user in one case and the permission in the other must be something which can be predicated of the defendant or the defendant's agent. It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent. It is not suggested that the appellants themselves used the premises wrongly; the facts are that they let them to MacIntosh and MacIntosh let them in separate tenements to the several undertenants. What is said is that the appellants permitted the premises to be used contrary to the terms of the covenant. To my mind the word "permit" means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it. Acts which fall short of that, though they be acts of sympathy or assistance, do not amount to permission at any rate in the covenants with which we are dealing. It is clear that no leave was given by the appellants either to MacIntosh to let the premises or to the undertenants to remain in them, and in my opinion there was no abstaining from taking reasonable steps to prevent a user contrary to the covenants.

First it was said the appellants ought when they issued their writ on May 26 against MacIntosh to have joined as defendants the undertenants actually in possession. It is plain that the action was properly constituted without the presence of the undertenants in actual possession. That was established in *Minet* v. *Johnson* (1), where the plaintiff having issued a writ against the defendant for possession signed judgment in

(1) (1890) 63 L. T. 507.

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default of appearance and the sheriff executing the writ of possession ejected a man named Hartley who was in actual possession but did not claim under the defendant. Hartley then applied to set aside the writ and subsequent proceedings, for irregularity. It was held that the right order was not that the writ, but that the judgment and subsequent proceedings, should be set aside on the terms that the applicant should within twelve days elect to be added as a defendant and that he should have liberty to appear by filing an affidavit that at the time of the issue of the writ he was in possession by himself or his tenant. The Court was of opinion that there was no irregularity and that although in the ordinary course the proceedings in an action of ejectment ought to be served on the person actually in possession, there were circumstances in which this was no longer necessary. In my opinion where the actual occupants are a number of weekly tenants the inconvenience of adding them all as parties to the writ is apparent. Their immediate landlord can always obtain the right to give possession by giving them notice to quit and unnecessary difficulties are put in the way of a landlord who desires to get possession of tenement houses if he must add every one of the weekly tenants occupying rooms or tenements in the demised premises. In this case before the judgment was actually signed MacIntosh had given a week's notice to all the undertenants, and they therefore would have had to quit the premises but for their claim to remain in possession under the Rent Restrictions Act, 1920. The gravamen of the charge against the appellants is that they took no proceedings to obtain possession against the undertenants. The appellants answer that there is authority for holding that under the Rent Restrictions Act, 1915, these undertenants would have been entitled to remain in possession (1) and that under the Act of 1920 it is extremely doubtful whether possession could be recovered against them ; that in any case the Court would have a discretion to stay or adjourn the proceedings and that the appellants have power to apply under s. 27 of the

(1) See *Berton* v. *London and Counties House Property Co.* Unreported. The Times, May 19, 1920.

Housing and Town Planning Act, 1919, to the county court for permission to convert these premises into and let them as separate tenements. For my part I am inclined to think that in certain circumstances a man may permit the continuance of an act if he can prevent it by taking legal proceedings and refrains from doing so. I can imagine a simple case, where a bailee, having agreed with the owner of a chattel not to permit any third person to have possession of it, is deprived of it by a third person; where he knows the third person is in possession of the chattel, and that a writ claiming a specific return of it could have but one result; if he refrained from taking proceedings I suggest that he might be held to have permitted the third person to have possession. But all the circumstances must be taken into account, and where there is a reasonable doubt whether legal proceedings to stop an act would be successful; where, for example, a person takes legal advice and comes to the conclusion that he could not reasonably expect legal action to be successful, there he does not permit the act by abstaining from legal proceedings. That is all that can be said against the appellants, and the respondents have failed to establish a breach of covenant. The appeal must therefore be allowed and judgment must be entered for the appellants. I should like to add that I share the doubt expressed by Bankes L.J. whether the Court could properly impose as a condition of granting relief against a forfeiture an undertaking that a party should not avail himself of the statutory rights conferred in the public interest by the Housing and Towning Planning Act, 1919.

YOUNGER L.J. I entirely agree and have nothing to add.

Appeal allowed.

Solicitors for appellants: *H. B. Nisbet & Co.*
Solicitors for respondents: *Druces & Attlee.*

W. H. G.

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